

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH CAROLINA
AT
RALEIGH

FALL TERM, 1930

J. G. JENNINGS v. JOHN SHANNON ET AL.

(Filed 10 December, 1930.)

1. **Mortgages H m—Purchaser at sale must prove title before crops were severed when intervening in action between mortgagor and tenant.**

Where the purchaser of lands at foreclosure under the power of sale contained in a mortgage, intervenes in the landlord's action against the tenant for the possession of crops grown thereon, depending upon her title acquired under her deed given in pursuance of the sale, the burden of showing her title is upon the intervener, and she must establish as against the plaintiff the fact that the crops in question had not been severed or harvested at the time she had acquired her title under her deed, and a mere showing of demand for the crops is not sufficient.

2. **Same—Purchaser at foreclosure sale is ordinarily entitled to landlord's lien if his title is prior to severing of crops.**

Lien upon the crops grown on lands by a tenant are incident to and connected with the estate in reversion and follows the assignment to a bargainee unless the crops are at the time severed or secured by a bond or note sufficient to break the connection and separate the obligation from the estate, and where mortgaged lands are in possession of a tenant and a foreclosure is had during the term of the lease the right to the lien on the crops for rent is dependent upon title to the land.

3. **Same—Purchaser at sale intervening in action by mortgagor against tenant should set up claims against mortgagor before judgment.**

Where an intervener claiming crops grown upon the mortgaged lands as the purchaser of the lands at the foreclosure sale of the mortgage, any offsets or credits she may desire to claim against the mortgagor should

JENNINGS v. SHANNON.

be set up by her before judgment, and *held further*, under the facts of this case the question as to whether the purchaser paid for the lands upon delivery of her deed is not important.

APPEAL by intervener, Kate M. Gregory, guardian of William H. D. Morris, Kathryn S. Morris, Mary Louise Morris, and Jesse J. Morris, from *Nunn, J.*, at January Term, 1930, of PASQUOTANK.

The case was heard on the following agreed statement of facts: On 1 September, 1924, the plaintiff and his wife executed a deed of trust to the Southern Trust Company, trustee, conveying land to secure bonds. The deed of trust was duly executed, delivered and recorded, and the sale held thereunder on 11 September, 1928, was regular and proper, at which time the intervener, Kate M. Gregory, guardian, became the purchaser. The plaintiff was the owner of and in possession of the lands on which the crops in dispute were raised on 1 January, 1928, said plaintiff having as his tenant from year to year for 1928, John Shannon, and said plaintiff remained in possession of said lands until title passed to Kate M. Gregory, intervener. The crops were matured and had been harvested and separated by John Shannon prior to the institution of this proceeding, said John Shannon remaining on said lands as tenant during the year 1929. It is admitted that the value of the crops taken under claim and delivery was \$420, and that plaintiff, if successful, should recover said amount, less any credits or offsets to which the intervener is entitled. A deed to the property on which said crops were raised, dated 1 January, 1929, acknowledged 13 April, 1929, was executed and delivered to Kate M. Gregory, intervener, and at the same time a deed of trust to secure the purchase price was executed and delivered by said intervener. Said deed was duly and properly recorded in the office of the register of deeds in Pasquotank County in Book 75, at page 291, and 292, on 17 August, 1929. Said crops were not matured nor harvested on 11 September, 1928. Shortly after said date the intervener notified the tenant, John Shannon, not to deliver the landlord's portion of said crops to plaintiff. The plaintiff contracted to sell the landlord's portion of said crops and went upon said land for the purpose of removing said crops a few days prior to the institution of this proceeding. Upon discovering that the defendant, Gregory, had started to remove a portion of said crops plaintiff instituted this proceeding.

Shortly prior to the sale, on 11 September, 1928, Mrs. Gregory, intervener, was advised by the trustee that the amount due on the Jennings deed of trust dated 1 September, 1924, was \$4,388.40. When the property was sold she bid that amount—there being no other bids and no raise—from which, after paying the following items, to wit: Newspaper advertising \$12.00, trustee's commission \$219.42, court costs

JENNINGS v. SHANNON.

\$5.70, Southern Trust Company, insurance premium, \$38.45; the trustee had in hand and applied on said bond the sum of \$4,112.83.

McMullan & LeRoy for plaintiff.

Worth & Horner for intervenor.

ADAMS, J. Mrs. Gregory, as intervenor, was not concerned with the controversy between the plaintiff and his tenant; she was concerned with the protection of her interest in the property. Upon her, therefore, devolved the burden of establishing her title. *Lockhart v. Insurance Co.*, 193 N. C., 8; *Sitterson v. Speller*, 190 N. C., 192; *Temple v. LaBerge*, 184 N. C., 252.

Rent reserved by a landlord is rent service and passes to the assignee of the reversion. *Kornegay v. Collier*, 65 N. C., 69; *Rogers v. McKenzie*, *ibid.*, 218; *Bullard v. Johnson*, *ibid.*, 436. In *Wilcoxon v. Donnelly*, 90 N. C., 245, it is said that rents accruing under a contract of lease are incident to and connected with the estate in reversion, and, when the estate is transferred, follow the assignment to the bargainee unless they are at the time overdue or are secured by bond or note, which breaks the connection and separates the obligation from the estate. And in *Mercer v. Bullock*, 191 N. C., 216, it is said that when mortgaged lands are in the possession of a tenant and a foreclosure is had during the term of the lease, the title to the rent is dependent on that of the property.

The intervenor did not acquire the legal title to the property until the deed was executed and delivered. The deed was dated 1 January, 1929; it was acknowledged 13 April and recorded 17 August, 1929. The purchase money was not paid at the time of the sale. The date the deed was delivered to the intervenor is not definitely ascertained, but when it was delivered the price was secured by a deed of trust. For this reason we are not interested in the question whether full payment on the day of sale would have vested in the purchaser such an equitable interest as would have entitled her to rents subsequently accruing. *Grosvenor v. Bethel*, 26 S. W., 1096; Note C, L. R. A., 1915 C, 206.

The intervenor has not shown that the sale was consummated and the deed delivered before the crops had been harvested and divided between the landlord and the tenant. Indeed, the facts seem to be directly the reverse. *Collins v. Bass*, 198 N. C., 99, cited by the appellant, is authority for the position that where the mortgagee or purchaser has not entered, or the crops are severed before entry, he is not entitled to them. The mere demand of the intervenor, in the absence of evidence that she held a legal or equitable title when she demanded the rent, is not such entry as the law contemplates. Presumably her deed was not delivered

IN RE WILL OF CRABTREE.

prior to the time its execution was acknowledged; if so, when she received her deed the crops had been severed and the landlord's rent had been paid.

The appellant contends that the judgment should be reduced by "any credits or offsets to which the intervener is entitled." This is an agreed fact; but such credits or offsets should have been set up before the judgment was rendered.

Affirmed.

IN THE MATTER OF WILL OF JOHN W. CRABTREE, DECEASED.

(Filed 10 December, 1930.)

1. Wills D h—Mere fact that testator had served as juror is incompetent on issue of mental capacity.

In an action involving the mental capacity of a testator to make the will in controversy, there being evidence that he had been committed to a hospital for the insane, with further evidence that he had been discharged as cured, C. S., 6214: *Held*, the admission of evidence to the effect that he had since served on the jury in the trial of several cases without indication that it was to be followed by testimony as to capacity to serve is reversible error.

2. Same—Where testator has been discharged from asylum as cured his commitment therein raises no presumption of mental incapacity.

Where it is shown that the testator upon the caveat of his holographic will has been committed to an insane asylum: *Held*, upon the issue of his testamentary capacity an instruction that "a will duly probated in accordance with the formalities of law is presumed to be valid" is not objectionable, there being no presumption of mental incapacity by reason of the commitment in the asylum when it has been shown that the testator had been discharged as restored or cured by a certificate issued in accordance with the provisions of C. S., 6214. *Jones v. Winstead*, 186 N. C., 536, cited as controlling.

CIVIL ACTION, before *Harris, J.*, at June Term, 1930, of ORANGE.

On 10 September, 1926, John W. Crabtree duly made and executed his last will and testament. The testator died in 1929, at the age of 77 years. A caveat was filed to the will on or about 17 August, 1929. On 17 August, 1900, the testator was duly committed to the State Hospital for the Insane at Morganton, North Carolina, and thereafter on 4 May, 1901, the testator was duly discharged from said hospital.

The following issues were submitted to the jury:

"1. Was the paper-writing offered for probate as the last will and testament of John W. Crabtree signed and executed according to law?

2. If so, did the said John W. Crabtree have mental capacity to make a will?

IN RE WILL OF CRABTREE.

3. If so, was the execution of said paper-writing procured by undue influence?

4. Is the paper-writing propounded, and every part thereof, the last will and testament of John W. Crabtree, deceased?"

There was no evidence offered as to undue influence, but there was much evidence that at the time of making the will the testator did not have sufficient mental capacity, and there was also much evidence to the contrary.

The jury answered the first issue "Yes"; the second issue "Yes"; the third issue "No," and the fourth issue was answered "Yes," by consent. From judgment upon the verdict the caveator appealed.

McLendon & Hedrick for caveators.

Graham & Sawyer for propounders.

BROGDEN, J. Is evidence that the testator served on a jury in his county, about a year before the date of the will, competent upon the question of mental capacity?

The record shows that "the propounders offered in evidence minute docket of Orange Superior Court, October Term, 1925, showing that John W. Crabtree served as a regular juror in the trial of several cases." This evidence was admitted and the caveators excepted and assigned the ruling of the court as error. The competency of such evidence was construed in *Ray v. Ray*, 98 N. C., 566. In that case the propounders proposed to prove that after the execution of the will the testator acted as foreman of the grand jury in Yancey County, and that he also held office in that county. Upon objection the evidence was excluded and the propounders excepted. The Court said: "It does not appear, unless inferentially, for what purpose the information was sought to be elicited, or that a favorable response was to be followed by an inquiry as to the intelligence with which the duties thus imposed were performed. The question would be pertinent only in this view, and its purpose ought to have been stated. It may be that the witness had no personal knowledge on this point, and only knew that the deceased had occupied these places. It was due to the presiding judge to be thus informed, if the object was to proceed further in the examination, as well as conducive to a fair trial, and not leave the ruling to rest upon the naked facts of official service, in which the evidence would have been restricted to showing mental capacity. We do not, therefore, reverse the ruling of the court under the circumstances."

So, in the present case, the evidence objected to, rests upon the naked fact of jury service and no more. Hence the exception taken by the caveators is sound and tenable and is sustained.

LITAKER v. STALLINGS.

The court charged the jury in substance that a will duly executed by the maker thereof, in accordance with the formalities of law, is presumed to be a valid paper-writing and the maker presumed to have capacity to make such instrument, in the absence of fraud or undue influence. The caveators insist that it having been shown that the testator was committed to the insane asylum in 1900 that the presumption of sanity or of mental capacity was thereby rebutted. However, the record discloses that the defendant was duly discharged from custody on 4 May, 1901, and a certificate of sanity or restoration issued in accordance with C. S., 6214. This section of the Revisal was in full effect at the time the certificate of discharge was issued. Moreover it appears that for a period of twenty-eight years after such certificate of discharge the testator transacted business and looked after his affairs. Hence the principle enunciated and applied in *Jones v. Winstead*, 186 N. C., 536, is pertinent and controlling upon the facts disclosed by the record. See, also, *Orr v. Beachboard*, 199 N. C., 276.

New trial.

C. L. LITAKER, EXECUTOR, v. MRS. P. F. STALLINGS ET AL.

(Filed 10 December, 1930.)

- 1. Wills F a—In this case held: amount of specific bequest should be paid and deducted from proceeds of sale to make assets.**

Upon construing a will to effectuate the testator's intent, a bequest to a son of a certain sum of money and the residue, consisting of real and personal property, to a daughter: *Held*, the specific bequest to the son will be paid and deducted from the proceeds of the sale of the lands to make assets, the personalty being insufficient, so that the son may receive the amount of money specifically bequeathed to him.

- 2. Wills E f—Determination of persons entitled to property upon lapse of legacy by death of legatee.**

Where a daughter of the testator is devised and bequeathed the residue of the estate real and personal after a bequest of a specific sum of money to a son, and the daughter predeceases her father, the legacy lapses and the intent of the testator may be ascertained by striking out the name of the daughter and inserting in lieu thereof the names of those entitled to take, whether by descent or under the will. *McGehee v. McGehee*, 189 N. C., 558, distinguished.

APPEAL by respondents from *Clement, J.*, at August Term, 1930, of CABARRUS.

Special proceedings to sell land to make assets to pay debts and charges of administration, and to pay a specific bequest of \$500.

LITAKER v. STALLINGS.

From a judgment in accordance with the prayer of the petition, the respondents appeal, assigning error.

Hartsell & Hartsell for petitioner.

J. Lee Crowell and J. Lee Crowell, Jr., for respondents.

STACY, C. J. The case presents for construction the will of Mrs. M. M. Litaker.

Item 1 provides for the payment of debts.

"Item 2. I will and bequeath to my beloved son Chas. L. Litaker five hundred dollars.

"Item 3. I will and bequeath to my beloved daughter Louise V. Litaker all of the rest of my property both real and personal of whatsoever kind."

Item 4 names Chas. L. Litaker as executor.

The personal property is not sufficient to pay the decedent's debts and the costs of administration. Louise V. Litaker predeceased the testatrix and left no issue her surviving, hence the devise to her in Item 3 of the will lapsed. 28 R. C. L., 336; Note, 44 L. R. A. (N. S.), 814. The respondents, who are also children of the testatrix, claim the land, devised in Item 3, as tenants in common with their brother, Chas. L. Litaker.

The only question presented for decision is whether the specific bequest of \$500 to Chas. L. Litaker is to be paid out of proceeds derived from a sale of the land, which it must be, if paid at all, because the personal property is not sufficient to pay the decedent's debts and the costs of administration.

Conceding that the decisions elsewhere are variant, as counsel point out in their briefs, the rule in this jurisdiction is, that when in a residuary clause land and personalty are made a mixed fund, both may be resorted to for the payment of pecuniary legacies. "This, however, is not on the footing of a charge on the land," says *Pearson, C. J.*, in *Robinson v. McIver*, 63 N. C., 645, "but on the ground that in order to ascertain what is embraced in the residuary fund, it is necessary to take out the specific legacies and then to deduct the pecuniary legacies, and only what remains is 'the rest or residue of the estate.'" *Johnson v. Farrell*, 64 N. C., 266. See *Rinehart v. Rinehart*, 98 W. Va., 93, 126 S. E., 402, reported in 42 A. L. R., 649, with full annotation.

Where a lapse is brought about by the death of the legatee or devisee, as in the instant case, the intent of the testator may be ascertained by striking out the name of such legatee or devisee and inserting in lieu thereof the names of those entitled to take, whether they come into such right by descent or under the will, for while the legacy or devise, as

WATSON v. KING.

such, lapses, it may nevertheless be used to discover the intent of the testator. *Robinson v. McIver, supra*. In this respect, *McGehee v. McGehee*, 189 N. C., 558, 127 S. E., 684, is distinguishable, the whole will in that case being void.

We agree with the trial court that the will reveals an intent on the part of the testatrix that the specific bequest to Chas. L. Litaker in Item 2 should be paid out of her property real or personal. *Hill v. Toms*, 87 N. C., 492.

Affirmed.

E. F. WATSON ET AL. v. E. W. KING AND PACE LUMBER COMPANY.

(Filed 10 December, 1930.)

1. Principal and Surety B a: Parties B b—In this case held: joinder of surety with principal as party defendant was proper.

Where a contractor gives a surety bond for the faithful performance of a contract for the cutting of timber, it is not necessary to first ascertain by action or otherwise the amount of the liability of the contractor before uniting his surety as a party to an action for damages for its breach, the surety being a proper party for the complete determination or settlement of the question involved. C. S., 456. *Clark v. Bonsal*, 157 N. C., 270, cited and distinguished.

2. Pleadings D e—Demurrer admitted allegation of surety's liability and position that bond was not properly executed cannot be maintained.

Where the complaint in an action on the surety bond of a contractor, conditioned upon the faithful performance of a contract, alleges that the bond has been executed and was binding on the surety, a demurrer thereto admits this as a fact, and the position that the plaintiff had not sufficiently alleged the proper execution of the bond by the defendant surety corporation cannot be sustained.

APPEAL by Pace Lumber Company from *MacRae, Special Judge*, at Chambers in Asheville, 15 February, 1930. From YANCEY.

Action to recover damages for breach of contract.

In the complaint it is alleged that on 17 April, 1930, the plaintiffs, other than John A. Watson and E. F. Watson, administrator of J. A. Watson, entered into a written contract with the defendant King for cutting timber into lumber; that on the same date the defendants executed a bond in the sum of \$5,000, guaranteeing King's performance of the contract; that King failed to perform the contract; and that the plaintiffs have been damaged by reason of the breach in the sum of \$5,000.

Pace Lumber Company filed a demurrer on two grounds: 1. There is a misjoinder of parties in that the plaintiffs jointly sued King as

FISHER v. FINANCE CO.

principal and Pace Lumber Company as surety without first establishing the amount of the plaintiffs' damages. 2. The complaint does not state a cause of action against the Pace Lumber Company for the reason that it does not allege that the bond was executed by authority of the corporation.

Watson & Fouts for plaintiff.

Blythe & Shepard and Charles Hutchins for Pace Lumber Company.

ADAMS, J. The appellant is in error in assuming that a judgment must be recovered against King, or the amount of his liability definitely determined, before the action can be maintained against Pace Lumber Company. The condition of the bond is King's faithful performance of the contract, and the appellant is a proper party to a complete determination or settlement of the question involved. C. S., 456. The same general relief is sought against both defendants and their presence is necessary to a complete adjustment of the controversy. As stated in *Bank v. Harris*, 84 N. C., 206, the dominant purpose of the statute is to make one proceeding adjust and settle all controversies affecting its subject-matter. *Wofford v. Hampton*, 173 N. C., 686. The case of *Clark v. Bonsal*, 157 N. C., 270, cited by the appellant, is not in point.

The second ground is likewise untenable. The demurrer admits the allegation that the corporation executed the bond and became liable to the plaintiffs. Confronted with this admission the corporate defendant cannot invoke the doctrine of *ultra vires* by demurring to the complaint. The charter of the corporation is the only source to which the Court can look to ascertain what powers are conferred and the charter is not set out in the complaint. *Victor v. Mills*, 148 N. C., 107, 112. Judgment Affirmed.

SAMUEL J. FISHER v. THE FINANCE COMPANY ET AL.

(Filed 10 December, 1930.)

Mortgages H b—In this case held: temporary order restraining foreclosure of deed of trust was properly dissolved.

The foreclosure sale under a power in a deed of trust securing the balance of purchase money will not be restrained for a breach of warranty against tax assessment liens where it is made to appear that the plaintiff had agreed to assume the assessment and receive a credit of the amount upon his note for the purchase price, the credit having been made according to the agreement.

MANUFACTURING Co. v. COTTON MILLS.

APPEAL by plaintiff from *Oglesby, J.*, at October Term, 1930, of BUNCOMBE.

Civil action to restrain sale of land under foreclosure.

From a judgment dissolving the temporary restraining order, the plaintiff appeals, assigning error.

Joseph W. Little for plaintiff.

No counsel for defendants.

STACY, C. J. Plaintiff purchased a lot of land from the defendant, the Finance Company, taking a deed therefor with full covenants of warranty, and executed a deed of trust thereon to secure payment of part of the purchase price. Foreclosure is sought to be enjoined on the ground that certain outstanding tax assessments, amounting to approximately \$1,500, constitute breach of warranty in defendant's deed. *Coble v. Dick*, 194 N. C., 732, 140 S. E., 745.

There is evidence that the plaintiff subsequently agreed to assume payment of said assessments on condition that a credit of like amount be made upon his notes given for the purchase price of the land, which was done.

The temporary restraining order was, therefore, dissolved for want of meritorious showing.

Affirmed.

AMOSKEAG MANUFACTURING COMPANY AND MANGET BROTHERS
COMPANY v. YADKIN COTTON MILLS, INC.

(Filed 10 December, 1930.)

Corporations G g—In this case held: judgments against corporation were not claims prior to its deed of trust.

Judgments against a corporation for its obligations arising on a contract are not superior to the lien of a prior registered deed of trust given to secure bondholders when the judgments were not in actions to recover for labor and clerical services performed or to recover damages for a tort committed by the defendant resulting in injury or death or for injuries to property within the meaning of C. S., 1140.

APPEAL by plaintiffs from *Grady, J.*, at October Term, 1930, of WILKES. Affirmed.

The above entitled actions were consolidated for trial and judgment by consent.

On the admissions in the answers, it was adjudged that each of the plaintiffs recover of the defendant the sum demanded in its complaint,

AHOSKIE *v.* MOYE.

but that neither of said judgments shall be a lien on the property of the defendant, conveyed by it, prior to the commencement of these actions by deed of trust to secure its bondholders, superior to the lien of the bondholders by virtue of the deed of trust.

From this judgment plaintiffs appealed to the Supreme Court.

Trivette & Holshouser and B. T. Henderson for plaintiff, Amoskeag Manufacturing Company.

*Bingham, Linney & Bingham for plaintiff, Manget Bros. Company.
T. C. Bowie for defendant.*

CONNOR, J. On their appeal to this Court, plaintiffs assign as error the refusal of the trial court to hold, and adjudge that under the provisions of C. S., 1140, the property of the defendant, a corporation, conveyed by its deed of trust to secure its bondholders, prior to the commencement of these actions, was not exempt from sale under execution to satisfy the judgments rendered in favor of the plaintiffs and against the defendant on the cause of action alleged respectively in the complaints. This assignment of error cannot be sustained. Neither of these actions is to recover for labor and clerical services performed by the plaintiff for the defendant; nor is either to recover damages for a tort, committed by defendant whereby any person was killed or injured; nor is either to recover damages for injuries to property, within the meaning of the statute. The cause of action alleged in each complaint is founded on contract. There is no error in the judgment. It is

Affirmed.

STATE AND TOWN OF AHOSKIE *v.* A. L. MOYE.

(Filed 10 December, 1930.)

Municipal Corporations H b—Ordinance regulating gasoline filling stations will be upheld as valid in absence of evidence of discrimination.

It is within the police power of an incorporated city or town to enact an ordinance under authority of statute prohibiting the erection or maintenance of a gasoline filling station within the town limits within one hundred and fifty feet of its designated graded school, and although filling stations will not be held nuisances *per se* as a matter of law, such ordinances will not be held unconstitutional in the absence of evidence that it is arbitrary or discriminatory, the burden being on the plaintiff, to prove it unconstitutional and void. *Wake Forest v. Medlin*, 199 N. C., 83, cited and applied as controlling.

ADAMS, J., dissents; CLARKSON, J., dissenting opinion.

AHOSKIE *v.* MOYE.

APPEAL by defendant from *Midyette, J.*, at April Special Term, 1930, of HERTFORD. Reversed.

This is a criminal action tried on a warrant charging defendant with a violation of an ordinance of the town of Ahoskie, a municipal corporation located in Hertford County.

By his plea of not guilty, defendant presented his contention that the ordinance is void, for that it is unconstitutional.

The jury empaneled at the trial returned a special verdict, in which the facts are found as follows:

"First. That on 10 February, 1930, the board of commissioners of the town of Ahoskie, N. C., a duly incorporated town, duly adopted the following ordinance of said town, to wit:

"Ordinance. From and after 1 April, 1930, it shall be unlawful for any person, firm or corporation to build, maintain or operate any gasoline filling station, or to keep or store gasoline, kerosene oil, or other like inflammable material in quantities greater than twenty-five gallons at one time, within 150 feet of the outside boundaries of the property of the Ahoskie Graded School, District No. 11, white.

"Any one violating this ordinance shall be fined fifty dollars for each offense, and each day that such filling station shall be operated or such gasoline, kerosene oil, or other inflammable material, shall be kept or stored in excess of twenty-five gallons, shall constitute a separate offense.

"Adopted 10 February, 1930."

"Second. That on 2 April, 1930, the defendant, A. L. Moye, did wilfully maintain and operate in said town a gasoline filling station on the corner of Main Street and State Highway No. 30, the same being within 150 feet of the outside boundary line of the Ahoskie Graded School District, No. 11, white, and did wilfully keep and store gasoline at and in said filling station in quantities greater than twenty-five gallons at one time within 150 feet of the boundary line of said school.

"Third. That the filling station maintained and operated by the defendant as aforesaid is the one marked 'Moore's Filling Station' on the map printed on page 94 of Volume 198 of the Supreme Court Reports of North Carolina, in the case entitled '*Burden v. Town of Ahoskie.*'"

"Fourth. That the said filling station was erected, owned and in operation by the defendant before and at the time of the adoption of the aforesaid ordinance by the commissioners of the town of Ahoskie."

The court was of opinion that upon the foregoing facts defendant was not guilty, and in accordance with said opinion directed that a verdict of not guilty be entered in this action.

From the judgment on the special verdict, the State appealed to the Supreme Court. C. S., 4649.

AHOSKIE v. MOYE.

Attorney-General Brummitt, Assistant Attorney-General Nash, and E. L. Travis for the State.

A. R. Dunning and A. T. Castelloe for defendant.

CONNOR, J. The sole question presented by this appeal, as stated in the briefs filed in this Court, both for the State and for the defendant, is whether or not the ordinance set out in the special verdict is valid and constitutional. If this question be answered in the negative, in accordance with the opinion of the court below, the judgment must be affirmed; otherwise, the judgment must be reversed.

It is conceded that on the authority of *Wake Forest v. Medlin*, 199 N. C., 83, decided by this Court on 2 July, 1930, the question must be answered in the affirmative, and the judgment reversed, unless the ordinance involved in this action can be distinguished from the ordinance which we held valid and constitutional in that case.

The ordinance which we held valid in *Wake Forest v. Medlin* was adopted by the commissioners of the town of Wake Forest on 29 January, 1929. It prohibited the erection, maintenance or operation of a filling station in any part of the town of Wake Forest, west of the Seaboard Air Line Railway tracks, on or after the first day of February, 1929. At the date of its adoption the defendant owned, and for some time prior thereto, had operated a filling station within the corporate limits of the town of Wake Forest, on the west side of the Seaboard Air Line Railway tracks. He continued to operate said filling station after the adoption of the ordinance and after it became effective according to its terms. In the action by the town of Wake Forest to recover the penalty prescribed by the ordinance for its violation, the defendant contended that the ordinance was unconstitutional and void. This contention was not sustained, and the judgment in favor of the plaintiff was affirmed on defendant's appeal to this Court. We held that the ordinance was valid, for that it operates on all alike within the territory affected and for that all within the prescribed limits are affected by its terms. It was not made to appear that the ordinance was unreasonable, arbitrary or unjust, because discriminatory. *Turner v. New Bern*, 187 N. C., 541, 122 S. E., 469, where the decision was by a unanimous Court, was cited as a direct authority for our holding. In that case *Clark, C. J.*, says: "It is primarily for the legislative body clothed with the police power to decide when and under what circumstances such regulations as the one in question are necessary and essential, and its determination in this regard, in view of its better knowledge of all the circumstances and of the presumption that it is action with a due regard for the rights of all parties, will not be disturbed by the courts unless it can be plainly seen that the regulation has no relation to the purposes

AHOSKIE v. MOYE.

above stated, but is a clear invasion of personal or property rights, under the police power."

The ordinance in the instant case was adopted by the board of commissioners of the town of Ahoskie on 10 February, 1930. It prohibited the erection, maintenance or operation of a filling station within a distance of 150 feet from the property of the Ahoskie Graded School District, on or after 1 April, 1930. At the date of its adoption, and for some time prior thereto, the defendant owned and operated a filling station within the prescribed limits of the town of Ahoskie. He continued to operate said filling station after 1 April, 1930. His violation of the ordinance, if the same is valid, is a misdemeanor under the laws of this State, C. S., 4174, for which he was guilty, and subject to a fine or imprisonment.

There is no distinction, in principle, between the ordinance in the instant case and the ordinance in the *Wake Forest case*. Neither is discriminatory on its face and, therefore, unjust; neither is unreasonable and, therefore, arbitrary. Both were adopted in the exercise of the police power of the State, conferred by the General Assembly on the board of commissioners of said towns. In *Wake Forest v. Medlin, supra, Stacy, C. J.*, writing for the Court, says:

"It is clearly within the police power of the State to regulate the business of operating such stations, and to declare that in particular circumstances, and in particular localities (*i. e.*, the residential section of a thickly populated town or city) a gasoline filling or gasoline storage station shall be deemed a nuisance in fact and in law, provided this power is not exercised arbitrarily, or with unjust discrimination, so as to infringe upon the rights guaranteed by the State and Federal Constitutions. *Reinman v. Little Rock*, 237 U. S., 171, 59 L. Ed., 900. So long as the regulation is not shown to be clearly unreasonable and arbitrary and operates uniformly on all persons similarly situated, the district itself being selected in the exercise of that reasonable discretion necessarily accorded to the law-making power, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the law, within the meaning of the constitutional provisions on that subject."

No facts appear in the special verdict from which it can be held that a filling station erected, maintained or operated within 150 feet of the property of the Ahoskie Graded School District is not a nuisance in fact, as declared by the law-making body of the town of Ahoskie. In the absence of such facts, or at least of evidence tending to show that the filling station operated by the defendant in violation of the ordinance is not a nuisance, the action of the commissioners of the town must be presumed to be well founded in fact as well as in law. The

AHOSKIE v. MOYE.

burden of showing that his filling station is not a nuisance was on the defendant. A filling station, although not a nuisance *per se*, may become so by its location. *Barger v. Smith*, 156 N. C., 323, 72 S. E., 376.

In each of the cases in which we have held that the ordinance involved therein, affecting filling stations, was void, it has appeared on the face of the ordinance, or from facts shown by the evidence, that certain persons, firms or corporations operating filling stations within the prescribed territory were exempted from the provisions of the ordinance, thus resulting in discriminations, which were arbitrary and therefore unjust. *Burden v. Ahoskie*, 198 N. C., 92; *MacRae v. Fayetteville*, 198 N. C., 54; *Clinton v. Oil Co.*, 193 N. C., 432, 137 S. E., 183; *Bizzell v. Goldsboro*, 192 N. C., 348, 135 S. E., 50.

On the facts set out in the special verdict in this case, the ordinance is valid. It was duly adopted by the board of commissioners of the town of Ahoskie. It is not discriminatory on its face. No facts are found by the jury, and set out in the special verdict, which support the contention of the defendant that, if not discriminatory, in law, the ordinance is discriminatory in fact. That the ordinance adopted by the board of commissioners in the exercise of the police power, conferred upon said board by statute, will result in injury to the defendant did not deprive the board of the power to adopt the ordinance. *Turner v. New Bern*, *supra*.

The defendant is guilty of a violation of a valid ordinance of the town of Ahoskie and the verdict must be so entered. The judgment is Reversed.

ADAMS, J., dissents.

CLARKSON, J., dissenting: The bill of indictment and ordinance, under which defendant is indicted, is as follows: "By maintaining and operating a gasoline filling station on the corner of Main Street and State Highway No. 30, the same being within 150 feet of the outside boundary line of the Ahoskie Graded School District No. 11, white, and did unlawfully and wilfully keep and store gasoline at and in said filling station in quantities greater than twenty-five gallons at one time, within 150 feet of the boundary lines of said school, all in violation of the following ordinance of said town, to wit: 'From and after 1 April, 1930, it shall be unlawful for any person, firm or corporation to build, maintain or operate any gasoline filling station, or to keep or store gasoline, kerosene oil, or other like inflammable material in quantities greater than twenty-five gallons at one time, within 150 feet of the outside boundaries of the property of the Ahoskie Graded School, District No. 11, white. Any one violating this ordinance shall be fined fifty

AHOSKIE *v.* MOYE.

dollars for each offense, and each day that such filling station shall be operated, or such gasoline, kerosene oil, or other inflammable material, shall be kept or stored in excess of twenty-five gallons shall constitute a separate offense. Adopted 10 February, 1930.'"

The special verdict, among other things, recited: "That, on 2 April, 1930, the defendant, A. L. Moye, did wilfully maintain and operate in said town a gasoline filling station on the corner of Main Street and State Highway No. 30, the same being within 150 feet of the outside boundary line of the Ahoskie Graded School District, No. 11, white, and did wilfully keep and store gasoline at and in said filling station in quantities greater than twenty-five gallons at one time within 150 feet of the boundary line of said school. That the filling station maintained and operated by the defendant as aforesaid is the one marked 'Moore's Filling Station' on the map, printed on page 94 of Volume 198 of the Supreme Court Reports of North Carolina, in the case entitled *Burden v. Town of Ahoskie*. (Fourth) That, the said filling station was erected, owned and in operation by the defendant before and at the time of the adoption of the aforesaid town ordinance by the commissioners of the town of Ahoskie." Upon the special verdict, the court below held the defendant not guilty. I think the court below correct.

The map in *Burden v. Ahoskie* is referred to in the special verdict. By reference to said map, we find that the school building is in Ahoskie, on the corner of North Carolina Highway and West Main Street, and it faces on the North Carolina Highway. The northwestern corner of the building is 194 feet from Moore's Filling Station, the one in controversy. From the center of the school building to the North Carolina Highway is 126 feet. The North Carolina Highway is 61 feet wide and the filling station in controversy is across the highway from the school building and at the northeast corner, intersection of West Main Street and North Carolina Highway. The Burden, proposed filling station, is 166.50 feet from the northwestern corner of the school building. West Main Street is 60 feet wide and the Burden station is across West Main Street from the school building. Brewer's Filling Station is in the same block with the school building, and is not across the street as the station in controversy is, and it is 268 feet from the school building line. According to the map, the above are all the buildings in that large open space.

The question in this action: Can the governing body of a city take the outside boundary line of a school district and pass an ordinance prohibiting a gasoline station 150 feet from same, when the gasoline station is across a 61-foot public highway and 194 feet from the school building, said gasoline station already operating and doing business, and limiting the storage of gasoline in excess of 25 gallons? I think not.

AHOSKIE v. MOYE.

In *Standard Oil Co. v. City of Marysville*, 279 U. S., at p. 582, 73 Law Ed., p. 856, it is held: "A municipal ordinance requiring all tanks within the city limits used for the storage of petroleum products or other inflammable liquids to be buried at least three feet underground cannot be said to be so arbitrary and capricious as to deprive dealers in such products of their property without due process of law," etc.

This regulation was held not to be arbitrary and unreasonable as affecting public safety. In the present case it is no regulation, as in the above case, but prohibition. In the present case we have a legitimate business, a going concern, not a nuisance *per se*, absolutely destroyed when there is another gasoline station, and the other 268 feet from the schoolhouse in the same block, allowed to carry on their business. On the argument it was stated that the gasoline station in controversy was valued at \$10,000. This ordinance does not regulate, but destroys, this valuable business. The ordinance has no relation to public safety, health, morals or general welfare, and therefore arbitrary and unreasonable. It takes private property without just compensation.

In *Turner v. City of New Bern* and *Wake Forest v. Medlin*, the ordinance covered a large portion of the city and town. The main decision in this case means that the governing body of a city can pass perhaps dozens of ordinances in a large city and less number in a town and destroy every gasoline station within 150 feet of a school property and confiscate perhaps hundreds of thousands of dollars and wipe out vested rights.

In *Reynolds v. Brosnan*, S. E. Rep., Vol. 154, No. 3 (17 July, 1930), at p. 267, the Supreme Court of Georgia, we find: "'Private property shall not be taken or damaged, for public purposes, without just and adequate compensation being first paid,' in so far as said act is interpreted by the public officials of the city of Albany to authorize a refusal of a permit sought by an owner of property to construct a filling station which conforms in every way to the building regulations of the city," is in conflict with the Constitution above set forth and due process clause.

The provision of the Georgia Constitution is the organic law of every civilized country. In *Johnston v. Rankin*, 70 N. C., 555, it is said: "Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the government of the State, *S. v. Newsom*, 5 Iredell, 50 (27 N. C., 250), yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." *S. v. Lyle*, 100 N. C., 497; *Parks v. Commissioners*, 186 N. C., at p. 499.

STATE v. STERLING.

The case of *State ex rel. Srigley v. Woodworth* (Ohio), 169 N. E., 713 (14 June, 1929) is in point. "In *Pritz v. Messer*, 112 Ohio St., 628, 129 N. E., 30, the Supreme Court sustained a zoning ordinance which comprehended the entire city of Cincinnati, and under the authority of that case if the defendant in this case could justify his action under an ordinance that zoned the entire city of Athens, he would be warranted in his refusal of a permit in this case. In *City of Youngstown v. Kahn Bros. Building Co.*, 112 Ohio St., 654, 148 N. E., 842, 43 A. L. R., 662. . . . The fair effect of considering together the two opinions just referred to is that the Supreme Court sustains a comprehensive city-wide ordinance which prohibits the construction of an apartment building within a residential district, and refuses to sustain an ordinance containing a like exclusion where only a part of the city is zoned unless it be shown that the block ordinance prevents the erection of a building that would be a nuisance or a place for carrying on a business that would be a nuisance. The Supreme Court of this State has held that a filling station is not a nuisance *per se*, *Powell v. Craig*, 113 Ohio St., 245, 148 N. E., 607, and we find nothing in the legislation of the city of Athens nor in the statutes of the State that declares a filling station to be a nuisance *per se* even within a residential district. It may be seriously questioned, therefore, whether a block ordinance, as distinguished from a comprehensive zoning ordinance, may block off a certain portion of a municipality and prevent filling stations from being erected therein without some sort of a showing that they will be inimical to the public health, safety, or morals of the affected district. In the absence of such showing, any such ordinance would seem to fall under the condemnation of the *Youngstown case*."

The present decision makes private property a "feather on the water."

STATE v. LANCEY STERLING AND GEORGE DAVIS.

(Filed 10 December, 1930.)

1. Criminal Law G i: G p—Testimony that when arrested defendant had appearance of having recently shaved held competent on question of identity.

Where the identity of the defendant is at issue on a trial for murder as the one who entered a store and shot and killed the deceased while attempting to rob a cash drawer, evidence of the State's witness that she saw him shoot the fatal shot and that he had a beard of several days' growth, who later hesitated in again identifying him upon seeing him

STATE v. STERLING.

shaved, and of another witness, the officer who made the arrest an hour or so later, that he then appeared as one who had hastily shaved with cold water, is competent as a short-hand statement of a collective fact, and not objectionable as inexpert opinion evidence.

2. Homicide B a—Evidence that crime was murder in first degree held sufficient.

Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, C. S., 4200, under proper instructions from the court thereon upon conflicting evidence.

3. Criminal Law L e—Slight inaccuracies in charge, not brought to court's attention in apt time, held not to entitle defendant to new trial.

Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with C. S., 564.

APPEAL by defendants from *Cranmer, J.*, at March Term, 1930, of NEW HANOVER. No error.

The defendants in this action were tried on an indictment in which they were charged with the murder of John Brown, deceased.

The evidence for the State tended to show that shortly before 11 o'clock, on the night of 4 January, 1930, two men—one a tall yellow negro, the other a small black negro—entered a store in the city of Wilmington, N. C., for the purpose of robbery. The only person in the store when they entered was John Brown, who was employed therein as a clerk. His father, William Brown, was the owner of the store. When the men entered the store John Brown was behind a counter, near the money drawer.

Miss Georgia Brown, a sister of John Brown, testified that she went into the store at about 11 o'clock to speak to her brother. The only persons in the store at this time were John Brown and the two negro men. She saw the tall yellow negro standing in front of her brother, with a pistol in his hand. The counter was between them. The small, black negro was behind the counter, walking in the direction of the money drawer. When she realized the situation, Miss Brown exclaimed to her brother, "John, what is the trouble?" Before he could reply, the tall yellow negro shot him with the pistol. Miss Brown then ran to her brother, saying, "John, have they hurt you?" He replied, "Yes, Georgia; run before they shoot you." When the pistol was fired by the tall yellow negro, the small black negro ran from behind the counter, and out of the store. As Miss Brown started to the telephone in the store, the tall yellow negro followed her, with a bag in his hands. Ap-

STATE *v.* STERLING.

prehending that he was about to assault her, she screamed, and he ran out of the store. Both men escaped, and Miss Brown called the police headquarters over the telephone. When the officers arrived at the scene, they found that John Brown had been mortally wounded. They took him to the hospital, where he died soon after his arrival there. His death was the result of the wound, caused by the pistol fired by the tall yellow negro, while the small black negro was behind the counter, going in the direction of the money drawer.

Miss Brown testified that she had never seen either of the men whom she saw in the store at the time her brother was shot, before the night of the homicide. However, while testifying at the trial, she identified the defendant, Lancey Sterling, as the tall yellow negro who shot her brother. She said, "I now identify the defendant, Lancey Sterling, as the man who shot my brother."

This defendant was arrested on Sunday morning, between 8 and 9 o'clock, because of the description given to the officers by Miss Brown the night before, immediately after the homicide, of the man who shot her brother. When she first saw the defendant in the custody of the officers, at the jail, she hesitated to identify him positively, because he did not then have a beard. She had stated to the officers, and so testified at the trial, that the man who shot her brother had a beard, apparently of three or four days growth, on his face. There was evidence tending to show that the defendant went to his home on the night of the homicide after 12 o'clock; and that between this time and the time of his arrest the next morning, he had shaved himself. One of the officers, who arrested the defendant at the home of his mother, testified that his face, at the time of the arrest, "appeared to be the face of a man who had taken a hasty shave with a dull razor in cold water."

Miss Brown testified that she could not identify the defendant, George Davis, as the small black negro whom she had seen behind the counter, going in the direction of the money drawer, when she went into the store on the night of the homicide, and who ran out of the store, when the pistol was fired. She had never seen this man before, and could only testify that he was a small black negro.

Ben Johnson, a witness for the State, testified that he had known the defendant, George Davis, for about fifteen years—for about three years in the city of Wilmington, and prior to that time in South Carolina and Georgia. He saw the defendant on Sunday morning after the shooting of John Brown on Saturday night. The defendant then told the witness that Mr. Brown's son, John, had been shot and killed in his father's store the night before. The witness next saw the defendant in Wilmington on the following Wednesday evening at about 6 o'clock. On this occasion the defendant told the witness that he was in the store when

STATE v. STERLING.

John Brown was shot; that he had met a man on the street near the store that night; that in consequence of his agreement with this man, he went with him to the store; that the man held up John Brown with a pistol, and that he had started behind the counter to get the money from the money drawer; that then the girl came in, the man fired his pistol, and he got scared and ran out of the store.

Joe Nick Byrd, a witness for the State, testified that he had known the defendant, George Davis, for about two months before the homicide; that on the night of the homicide the defendant was at his store, from about 8 o'clock until some time after 10 o'clock; that soon after 8 o'clock the defendant went to Mr. Brown's store, which is near the witnesses' store, on an errand for the witness; that he returned to witnesses' store and remained there until about 10 o'clock; that about 10 o'clock defendant went on another errand for witness, and returned at about 11:30, and that he remained at his store for several hours after his return. The witness first heard of the homicide at about 12:30 that night. The witness could not say whether or not the defendant was at his store when some men came in and told about the homicide; he could not remember as to this.

The defendant, George Davis, was arrested at a lumber camp several miles from the city of Wilmington, on Wednesday or Thursday night after the homicide. The arrest was made because of information received by the officers as to his statement to Ben Johnson. After the arrest the defendant was taken to the jail in the city of Wilmington, where a warrant charging him with the murder of John Brown was served on him. The officer who served the warrant testified that after he had read it to the defendant, the defendant said, "My God, Mr. Tindall, what do you think they are going to do with me?" The officer replied that he did not know. The defendant then said, "I didn't kill the man." Subsequently, while confined in jail, the defendant, in the presence of the defendant, Lancey Sterling, said to the officers, "Lancey Sterling is the man who shot John Brown." Lancey Sterling replied, "I have not shot anybody." The defendant then said, "You did; you have the same cloth around your head now that you had on your head the night you shot him."

The defendant, George Davis, did not testify as a witness at the trial.

The defendant, Lancey Sterling, testifying in his own behalf, denied that he shot John Brown, and denied that he was in the store when John Brown was shot. He testified that on the night of the homicide he was at his mother's home in the city of Wilmington from about 10 o'clock until after 12, when he went to his home. He offered the testimony of several witnesses as evidence in support of his alibi. He testified that when the defendant, George Davis, said in his presence and in

STATE v. STERLING.

the presence of the officers, that he was the man who shot John Brown, he replied to him, "For God's sake, look at me. I never saw you before in my life."

At the conclusion of all the evidence, and after the charge of the court to the jury, the jury returned the verdict appearing in the record, to wit: "Guilty of murder in the first degree, as to both defendants."

From the judgment that each defendant suffer death by means of electrocution, as provided by statute, both defendants appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

George Rountree, Jr., for defendants.

John Q. LeGrand and Newman & Sinclair assigned by the Court for defendant, George Davis.

CONNOR, J. Miss Georgia Brown, sister of the deceased, John Brown, and the only witness for the State, as shown by all the evidence, who was present at the time the deceased was shot and killed, testified that the man who shot and killed the deceased had a beard, of apparently three or four days growth, on his face. All the evidence was to the effect that at the time of his arrest, which was within a few hours after the homicide, the defendant, Lancey Sterling, who was identified by Miss Brown as the man who shot her brother, had no beard on his face. The evidence for the State tended to show that he had recently shaved. The evidence for the defendant was to the contrary. One of the officers who made the arrest, in his direct testimony, said: "Lancey's face appeared to me as the face of a man that had taken a hasty shave with a dull razor in cold water."

The case on appeal does not show that this statement was made by the witness in response to a specific question addressed to the witness by the solicitor. The record shows that counsel for defendant objected to the statement, saying: "That is merely an opinion." To this the court replied: "That is what has been called a shorthand statement of facts." To this defendant excepted. His assignment of error based on this exception cannot be sustained. As was said in *S. v. Skeen*, 182 N. C., 844, 109 S. E., 71, this was only a shorthand method of giving the facts as they appeared to the witness. In that case, the statement of the witness, in describing the appearance of the defendant, was, "His clothes were damp—shoes muddy—looked like. Didn't look like they had been unlaced in several days." It was held that it was proper for the witness to state the instantaneous conclusion of his mind, from his observation of a variety of facts presented to his senses at one and the same time.

STATE v. STERLING.

The principle is stated and approved in *Willis v. New Bern*, 191 N. C., 507, 132 S. E., 286. See, also, *S. v. Gray*, 180 N. C., 697, 104 S. E., 647; *S. v. Bryant*, 178 N. C., 702, 111 S. E., 430; *S. v. Harden*, 177 N. C., 580, 98 S. E., 782; *S. v. Spencer*, 176 N. C., 709, 97 S. E., 155; *S. v. Leak*, 156 N. C., 643, 72 S. E., 567. In the last case cited, the principle as stated in McKelvey on Evidence, p. 220, *et seq.*, is approved by this Court. On this principle there was no error in overruling defendant's objection to the statement of the witness on the ground that it was merely an expression of his opinion. In passing upon this assignment of error, we interpret the record as showing in effect that defendant's counsel moved to strike out the statement, and that the motion was denied.

The sole question involved in the issue submitted to the jury at the trial of this action was one of identity. The uncontradicted evidence for the State shows that the homicide was murder. There was no evidence tending to show that the homicide was manslaughter, or that it was justifiable or excusable. All the evidence showed that the murder was committed in an attempt to perpetrate a felony, to wit, robbery. The homicide was, therefore, murder in the first degree, as defined by statute. C. S., 4200. On the authority of *S. v. Spivey*, 151 N. C., 676, 65 S. E., 995, approved in *S. v. Newsome*, 195 N. C., 552, 143 S. E., 187, the court might well have so instructed the jury, leaving the question as to the guilt of the defendants to be determined by the jury, under the instructions of the court, from the evidence. There was conflicting evidence as to the identity of the defendants, as the men who committed the murder, while attempting to perpetrate a robbery. This evidence was submitted to the jury under a charge which we find free from error. Slight inaccuracies in the statement of the evidence by the court in its charge to the jury, not called to its attention at the time, cannot be held as prejudicial error. In the instant case the charge was in substantial compliance with C. S., 564. The contentions of each defendant, as well as those of the State, upon the conflicting evidence, were fully and fairly stated by the court. The verdict is fully supported by the evidence, and we find no error in the record, for which either defendant is entitled to a new trial. The judgment is affirmed.

No error.

BOULDIN *v.* DAVIS.

STATE OF NORTH CAROLINA ON RELATION OF D. L. BOULDIN *v.*
W. A. DAVIS.

(Filed 10 December, 1930.)

Elections G b—Jurat of absentee ballots is only prima facie evidence that voters had sworn thereto and is rebuttable by parol evidence.

In an action in the nature of *quo warranto* proceedings to test the right of the defendant to hold a municipal office of a city on the ground that ballots of absentee voters were cast for the incumbent that should have been excluded for the reason that contrary to the jurat on the ballots the voters thereof had not in fact been sworn, the jurat is but prima facie evidence that the ballots had been sworn to by the respective voters, which may be rebutted by parol evidence, in this case by the testimony of those who had cast them. C. S., 5960, *et seq.*

APPEAL by defendant from *Schenck, J.*, at August Term, 1930, of GUILFORD. Affirmed.

This is an action instituted by the State of North Carolina, on the relation of D. L. Bouldin, a qualified voter of said State, residing in Ward No. 2 of the city of High Point, in the nature of a *quo warranto* (C. S., 870, and C. S., 871), for judgment that the defendant, W. A. Davis, be ousted and removed from the office of councilman of said city, from Ward No. 2, and that T. C. Johnston, having been duly elected thereto, be declared entitled to qualify for said office.

It is alleged in the complaint that the defendant, W. A. Davis, has usurped the office of councilman of the city of High Point, from Ward No. 2, and that he now unlawfully holds and performs the duties of said office, contending that at an election held in said ward, on 7 May, 1929, a majority of the votes cast at said election, were cast, counted and returned for said defendant, as appears by the return made to the city council by the registrar and judges of election, whereas in truth and in fact a majority of said votes were not cast for the defendant, but were cast and should have been counted and returned for T. C. Johnston, a resident of said ward, and eligible in all respects for said office.

The defendant in his answer denies the allegations of the complaint, other than that a majority of the votes cast at said elections were counted and returned for the defendant, as shown by the return of the registrar and judges of election. The defendant alleges that he was duly elected and has lawfully qualified as councilman of the city of High Point for Ward No. 2, and is now lawfully engaged in the performance of the duties of said office.

The issues arising on the pleadings, both of law and of fact, were, by consent, referred for trial to H. M. Robbins.

From the evidence at the hearings before him, the referee found that at the election held in Ward No. 2, of the city of High Point, on 7 May,

BOULDIN v. DAVIS.

1929, for the office of councilman from said ward, 574 ballots were cast for the defendant, W. A. Davis, and 585 ballots were cast for T. C. Johnston, resulting in a majority of 11 for T. C. Johnston. This finding of fact was made by the referee, by excluding from the number of votes for the defendant and also for T. C. Johnston, as returned by the registrar and judges of election, the ballots of persons who were not residents of Ward No. 2, and of persons who were not entitled to vote an absentee's ballot, because of failure to comply with the statute. The referee concluded from his findings of fact that the defendant, W. A. Davis, was not entitled to the office of councilman of the city of High Point, from Ward No. 2, and that T. C. Johnston was entitled to said office.

The report of the referee, with exceptions filed thereto by both plaintiff and defendant, was heard by the judge. All the exceptions were overruled except certain exceptions filed by the plaintiff pertinent to one vote. These latter exceptions were sustained, and the report of the referee was modified by adding one vote to the total number of votes for T. C. Johnston, as found by the referee. As thus modified, the report of the referee was approved by the judge and duly confirmed.

From judgment (1) that the defendant, W. A. Davis, is not entitled to the office of councilman of the city of High Point, from Ward No. 2, and that said defendant be ousted and removed from said office; and (2) that T. C. Johnston, having been elected thereto by a majority of twelve votes at the election held on 7 May, 1929, is entitled to the office of councilman of the city of High Point from Ward No. 2, and that upon his qualification as required by law, the said T. C. Johnston is entitled to assume the duties and to receive the emoluments of said office during the current term, the defendant, W. A. Davis, appealed to the Supreme Court.

*Hoyle & Harrison and Shuping & Hampton** for plaintiff.

T. J. Gold, C. W. McAnally and Walser & Casey for defendant.

CONNOR, J. Defendant's appeal from a judgment in this action overruling his demurrer *ore tenus* to the complaint, challenging the right of the relator to maintain this action, was heard at the Fall Term, 1929, of this Court. The judgment was affirmed, 197 N. C., 731, 150 S. E., 567. The action has since been tried on the issues raised by the pleadings, by a referee, and is now here on the appeal of the defendant from the judgment in accordance with the report of the referee, as modified by the judge. The judgment adverse to the defendant is supported by the finding of fact that at the election for the office of councilman of the city of High Point from Ward No. 2, held in said ward on 7 May, 1929, 586 votes were cast for T. C. Johnston, and only 574 votes were

BOULDIN *v.* DAVIS.

cast for the defendant, W. A. Davis, the majority for the said T. C. Johnston being 12 votes.

It is conceded by the defendant in his brief filed in this Court that the judgment from which he has appealed must be affirmed, unless, as he contends, there was error in excluding 13 absentee ballots cast at the election for him. If these ballots were properly excluded defendant, not having received a majority of the votes cast at the election, is not entitled to the office of councilman of the city of High Point from Ward No. 2. If these ballots should have been counted for him, he was elected by a majority of one, and rightfully qualified for and holds said office.

The validity of the 13 ballots, all of which were cast by absentees, was challenged at the trial before the referee on the sole ground that although each of said ballots was accompanied by an affidavit, showing on its face that the subscriber had been sworn, in truth and in fact such subscriber was not sworn as required by the statute. C. S., 5960, *et seq.*

Evidence, consisting in each case of the testimony of the voter whose name was subscribed to the affidavit, was offered at the trial to the effect that the subscriber was not sworn by the officer whose name was signed to the jurat. Defendant contends that this evidence was incompetent, and should not have been admitted over his objection. The question of law involved in this contention is whether it is competent for a person who admits that he or she signed a paper-writing purporting to be and in form sufficient as an affidavit, to testify, after the affidavit has been accepted as establishing the facts to be as stated therein, that he or she was not sworn.

The jurat of an officer authorized to administer oaths is *prima facie* evidence of all matters properly stated therein; but it is not conclusive, and extrinsic evidence is admissible to prove that such statements are in fact false. 2 C. J., 367. In *Green v. Rhodes*, 8 Ga. App., 301, 68 S. E., 1090, it was held that the officer who signed the jurat to an alleged affidavit is competent to testify that the affidavit was not sworn to; and so it must be held that the subscriber to an alleged affidavit is likewise competent to testify that he did not swear to the affidavit. His testimony is admissible to show that he was not sworn; the jurat on the affidavit is evidence, only, *prima facie*, to the contrary and therefore subject to contradiction.

There was no error in excluding the 13 ballots cast for the defendant by persons who did not attend the election, but who sought to avail themselves of the privilege of the statute authorizing voters in certain instances to vote as absentees. *Davis v. Board of Education*, 186 N. C., 227, 119 S. E., 372. The judgment is

Affirmed.

GROCE v. GROCE.

FLOYD GROCE, ADMINISTRATOR C. T. A. OF T. A. GROCE, DECEASED, AND
FLOYD GROCE v. D. R. GROCE AND ALBERT GROCE.

(Filed 10 December, 1930.)

Wills E f—In this case held: will bequeathed remainder of personalty to two sons of testator, one half to each.

In construing a will regard will be given the language employed to effectuate the testator's intent, and where he has devised a certain part of his lands to his adopted son where he may select, and directs that the residue of his property, real and personal, be sold and the proceeds paid to his two sons "one-half that remains to D. and A. remaining money": *Held*, as to the personalty the two sons were the primary objects of the testator's bounty, and the money from the sale was to be divided between them after payment of debts and a tombstone as directed by the will, to the exclusion of the adopted son, and the further expression "kept on expenses after all debts are paid," evidently intended expenses of necessary upkeep of livestock and the like until the sale could be made.

ADAMS, J., dissents.

APPEAL by defendant from *Harding, J.*, at May Term, 1930, of YADKIN. **Reversed.**

The judgment of the court below was as follows: "This cause coming on to be heard before his Honor, W. F. Harding, judge presiding, at the May Term of the Superior Court of Yadkin County, and it appearing to the court that Floyd Groce, administrator *c. t. a.* of T. A. Groce, deceased, filed his final account for settlement with the clerk of the Superior Court of Yadkin County, on 15 July, 1929, showing the payment of all debts, and at the same time filed a petition against the parties interested in the due administration of the estate as provided in section 152 of the Consolidated Statutes of North Carolina, and that upon the hearing before the clerk of the Superior Court of Yadkin County, all parties being in court and represented by counsel, it being the opinion of the clerk that before a distribution of the personal property could be made it was necessary that the will of T. A. Groce be interpreted. It was, therefore, ordered by agreement of counsel that the matter of the distribution of the personal property under said will be transferred to the civil issue docket of the Superior Court of Yadkin County, it being understood and agreed by counsel representing the parties interested that T. A. Groce, deceased, died 2 February, 1928, and that he made a will bearing date of his death; that T. A. Groce lived by himself, he and his wife having separated several years previous, and that at the time of his death he owned 169.3 acres of land; that a partition of said lands has been made according to law; that the proceeds from the sale of the personal property amounted to about \$750, and the deceased had in

GROCE *v.* GROCE.

cash, at the time of his death, about \$1,500, and that there now only remains the question of the distribution of the personal property of the deceased under his will which is as follows:

'State of North Carolina,
Yadkin County
February A.D. 1928.

Considering my old age and uncertainty of life, I do herein make my last Will and Testament. I do bequeath to my adopted son Floyd T. Groce seventy-five acres of land where the said Floyd Groce may choose to take it. Floyd is to pay my debts and funeral expenses with tombstone. I do also bequeath to D. R. and Albert M. Groce the Remainder of my land—my personal property and effects to be sold by Floyd Groce or kept on Expenses after all debts is paid then Floyd Groce is to pay over one-half that remains to D. R. Groce and Albert Groce remaining money. So let be Amen. This Feb. 2, 1928. Witness my hand and seal.

T. C. GROCE (Seal).'

A photostatic copy of said will is hereto attached and made a part of this judgment.

And after reading said will, considering the same, and considering the argument of counsel for the parties interested, the Court is of the opinion and so adjudges that the true intent and meaning of the afore-said will of T. A. Groce, deceased, is as follows: That the administrator *c. t. a.* should pay all debts and costs of administration out of the personal estate, including moneys on hand belonging to the estate of T. A. Groce, and that the surplus, after paying said debts and the costs of administration, should be divided as follows, to wit: One-half of said surplus to be paid by the said administrator to D. R. Groce and Albert Groce jointly, to be divided equally between them, and the other half of said surplus to be retained or paid to Floyd Groce. It is further ordered and adjudged that the costs of this hearing for the construction of said will be included in the costs of the administration of the estate of T. A. Groce, deceased."

The defendants assigned error "For that his Honor erred in signing the judgment as set out in the record."

Williams & Reavis for plaintiff.

Benbow, Hall & Benbow for defendants.

CLARKSON, J. The question involved: Are D. R. Groce and Albert Groce the sole legatees of T. A. Groce, as to the personal estate after the debts are paid? We think so.

GROCE v. GROCE.

This case was here before, *In re Will of T. A. Groce*, 196 N. C., 373. It is there held: "The requirements of C. S., 4131, that a paper-writing sufficient to pass as a holograph will must be found after the death of the testator among his valuable papers and effects, must be liberally construed, and where it is found among the deceased's papers and effects evidently regarded by him as his most valuable papers, and are in fact valuable, under circumstances showing his intention that that will should take effect as being so found, it is sufficient, and under the facts of this case the paper-writing was adjudged to be effective as his will when found after his death in the pockets of the clothes he was wearing, with large sums of money and other papers of value." Headnote 3, *Groce case, supra*. In that case, at p. 374, we find the following statement: "This paper-writing purports to be the will of T. A. Groce, by which he devises to his adopted son, Floyd T. Groce, seventy-five acres of land, 'where the said Floyd Groce may choose to take it.' He bequeaths and devises the remainder of his property, real and personal, to his two sons, D. R. Groce, and Albert Groce, and directs that Floyd T. Groce shall pay his debts and funeral expenses, including a tombstone."

The construction of the will was not the question in controversy when this case was here before, but we think the statement as to the meaning of the will set forth in the case correct. The will made was holograph. The testator had an adopted son Floyd T. Groce and two sons D. R. and Albert Groce. The cardinal principle in the construction of a will is to ascertain the intention. This is to be gathered from the setting of the parties and the language of the will. The concluding part of the will "I do also bequeath to D. R. and Albert Groce the Remainder of my land—my personal property and effects to be sold by Floyd Groce or kept on Expenses after all debts is paid then Floyd Groce is to pay over one-half that Remains to D. R. Groce and Albert Groce remaining money."

The testator gives to Floyd T. Groce 75 acres where "he may choose to take it," and requires him to pay the debts and funeral expenses, and for the tombstone, and later provides that these are to be paid out of the personal property. Testator provides for the adopted son and then he deals with the remainder of his property, and in this his two sons are the primary objects of his bounty. Testator then leaves the remainder of his land to his two sons. Then he comes to dispose of his personal property. He designates Floyd Groce to sell his personal property and effects, or keep on expenses (any livestock no doubt until they could be sold). After all debts are paid, "then Floyd Groce is to pay one-half that remains to D. R. Groce and Albert Groce remaining money." "Remaining money," of course, meaning after the debts were paid and

BURLESON v. BOARD OF ALDERMEN.

the money remaining to be paid one-half each to D. R. and Albert Groce, his two sons, the primary objects of his bounty.

In *Mangum v. Trust Co.*, 195 N. C., at p. 472, quoting 28 R. C. L., part sec. 179, at page 219, we find: "In the interpretation of a will the dominant or primary intention, gathered from the whole thereof and all its provisions, must be allowed to control, and a particular and minor intent is never permitted to frustrate a general and ulterior object of paramount consideration. Accordingly in interpreting wills favor will be accorded to those beneficiaries who appear to be the special objects of the testator's bounty."

A reasonable inference also is that the testator left the most valuable land "75 acres of land where Floyd Groce may choose to take it," and the "remaining money" after payment of debts, etc., to his two sons, one-half each, no doubt equalizing the less valuable land they received.

For the reasons given, the judgment of the court below is Reversed.

ADAMS, J., dissents.

J. E. BURLESON ET AL. v. THE BOARD OF ALDERMEN OF THE TOWN OF SPRUCE PINE ET AL.

(Filed 19 December, 1930.)

1. Municipal Corporations K a—C. S., 2937 authorizes a city to issue bonds for public hospital with approval of voters.

While an incorporated town may not issue valid bonds for the erection and maintenance of a public hospital with the approval of its voters without statutory authority, this authority is conferred by C. S., 2796, 2937, and where a proposed issuance of such bonds had been authorized by ordinance under the provisions of C. S., 2938, and approved by the voters according to the provisions of C. S., 2948, and the other statutes relevant have been duly followed, the bonds so issued are a valid obligation of the town issuing them, and their issuance will not be enjoined by the courts, C. S., 7255, not applying to the facts of this case.

2. Same—Right of cities to issue bonds in general.

A municipality may issue valid bonds for its necessary expenses without the approval of its voters within the constitutional limitation in the absence of statutory authority, and with statutory authority and the approval of its voters it may issue bonds in excess of this limitation. Const., Art. VII, sec. 7, construed with Art. V, sec. 6.

APPEAL by plaintiffs from *Harding, J.*, at Chambers 25 June, 1930. FROM MITCHELL. Affirmed.

This is an action by plaintiffs, residents and taxpayers of the town of Spruce Pine, N. C., to restrain and enjoin the defendants, the board

BURLESON v. BOARD OF ALDERMEN.

of aldermen and mayor of said town, from issuing, selling or disposing of bonds of said town of Spruce Pine, for the purpose of raising money to defray the expense of constructing, maintaining and operating a public hospital in said town, and from levying and collecting, annually, sufficient taxes to pay the principal and interest on said bonds, as the same shall become due.

On 7 January, 1930, an ordinance was adopted by the governing body of the town of Spruce Pine, a municipal corporation existing under the laws of this State, authorizing the issuance of the negotiable coupon bonds of said town, in the maximum aggregate principal amount of \$35,000, for the purpose of raising money for the construction, maintenance and operation of a public hospital in said town, and ordering the levy and collection of a tax, annually, sufficient to pay the principal and interest of said bonds as the same shall become due. A statement of the debt of said town, signed and verified by the oath of its treasurer, showing that its net debt, including the amount of the bonds authorized by said ordinance, was \$89,478.41, and that the assessed value of taxable property in said town was \$1,361,453, was filed with its clerk, and was open for inspection. The said net debt, as shown by said statement, is 6.5 per cent of the said valuation. It was provided in said ordinance that the same should take effect when approved by the qualified voters of said town at an election to be held for that purpose, as provided in the Municipal Finance Act.

Thereafter, a special election was held in the town of Spruce Pine, on 4 March, 1930, pursuant to a resolution adopted by the governing body of said town, and after publication of the notices required by statute. The total number of voters registered for said election was 486; of these, 255 voted ballots, on which were written or printed the words: "For ordinance authorizing \$35,000 bonds for hospital and a tax therefor." This election was regular in all respects, and the result was duly declared, and recorded as required by statute.

All requirements of the Municipal Finance Act, relative to the adoption of said ordinance, the passing of the resolution for, and the notices of said election, were fully complied with. The defendants, the board of aldermen and the mayor of the town of Spruce Pine, unless restrained and enjoined from so doing by judgment in this action, which was begun on 3 April, 1930, will issue, sell and dispose of the bonds of said town of Spruce Pine, in the sum of \$35,000, and apply the proceeds of said bonds in constructing, maintaining and operating a public hospital in said town.

Upon the foregoing facts as found by the judge at the hearing of a motion that a temporary restraining order issued in this action be dissolved, it was considered, ordered and adjudged, that said temporary

BURLESON v. BOARD OF ALDERMEN.

restraining order be and the same was dissolved; it was further ordered and adjudged that the said bonds in the sum of \$35,000, when issued and delivered, will constitute a legal and binding obligation of the town of Spruce Pine.

Plaintiffs excepted to the judgment and appealed therefrom to the Supreme Court.

Charles Hutchins for plaintiffs.

McBee & McBee and W. C. Berry for defendants.

CONNOR, J. The findings of fact on which the judgment in this action was rendered were made by the judge from admissions in the pleadings, and from the official minutes of the town of Spruce Pine. There were no exceptions to these findings. The only exception on which plaintiffs assign error on their appeal to this Court, was to the judgment. Their contention upon this assignment of error is that the bonds which the defendants propose to issue and to sell were not a binding and legal obligation of the town of Spruce Pine, for the reasons: (1) that said bonds are not for a necessary expense within the meaning of Article VII, section 7 of the Constitution of North Carolina; (2) that the only legislative authority for the issuance of bonds by a municipal corporation for the purpose of constructing, maintaining and operating a public hospital is C. S., 7255; and (3) that the provisions of C. S., 7255, with respect to the issuance of bonds and the levy and collection of a tax, by a municipal corporation, for the purpose of constructing, maintaining and operating a public hospital have not been complied with in the instant case. For these reasons, plaintiffs contend that said bonds will not be a binding and legal obligation of the town of Spruce Pine, for the payment of which defendants will be authorized to levy and collect a tax, annually, notwithstanding their issuance has been approved by a majority of the qualified voters of said town.

It is conceded by defendants that the provisions of C. S., 7255, have not been complied with in the instant case. They contend, however, that the bonds which they propose to issue and to sell are authorized by C. S., 2796, and C. S., 2937; that the provisions of these statutes have been complied with, and that the issuance of said bonds, and the levy and collection of a tax, annually, for the payment of said bonds as they shall become due, was approved by a majority of the qualified voters of the town of Spruce Pine at an election duly called and held in accordance with the provisions of C. S., 2948.

In *Armstrong v. Commissioners*, 185 N. C., 405, 117 S. E., 388, the defendants insisted on their appeal to this Court that a public hospital should be considered a necessary expense of a municipal corporation,

BURLESON v. BOARD OF ALDERMEN.

and that for this reason bonds issued by the defendants in that case for the purpose of constructing, maintaining and operating a public hospital would be valid, although not issued in compliance with the provisions of Article VII, sec. 7, Constitution of North Carolina. In the opinion in that case, it is said: "We cannot so hold." In the instant case, therefore, the bonds will not be valid, unless their issuance was authorized by the General Assembly and approved by a majority of the qualified voters of the town of Spruce Pine. *Henderson v. City of Wilmington*, 191 N. C., 269, 132 S. E., 25, and cases there cited. In that case, speaking of Article VII, section 7, Constitution of North Carolina, it is said: "In analyzing and construing this section in its relation to the sixth section of Article V, the Court has held: (1) that for necessary expenses the municipal authorities may levy a tax up to the constitutional limitation without a vote of the people and without legislative permission; (2) that for necessary expenses they may exceed the constitutional limitation by legislative authority, without a vote of the people; and (3) that for purposes other than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority." This is a clear and accurate statement of the principles of constitutional law applicable to municipal taxation in this State.

In the instant case, the issuance of the bonds and the levy and collection of the tax was approved by the people of the town of Spruce Pine—that is, by a majority of the qualified voters of said town. The bonds are, therefore, valid, if their issuance was authorized by statute duly enacted by the General Assembly.

C. S., 2796, provides that the governing body of a city or town may acquire, establish and maintain a hospital or hospitals. Under the authority of *Adams v. City of Durham*, 189 N. C., 232, 126 S. E., 611, it may apply for that purpose funds already on hand in the treasury of the city or town; it cannot, however, raise money for that purpose by issuing the bonds of the city or town, or by levying and collecting taxes, without legislative authority and without the approval of a majority of the qualified voters of said city or town, at an election duly called and held therein.

C. S., 2937, provides that a municipality may issue its negotiable bonds for any purpose or purposes for which it may raise or appropriate money, except for current expenses. As a municipal corporation may appropriate money for the purpose of acquiring, establishing and maintaining a hospital, it may issue its bonds, and levy and collect taxes, for that purpose, with the approval of a majority of the qualified voters of the corporation. The requisite legislative authority is conferred by this statute.

MORGAN v. OWEN.

In the instant case, the bonds were authorized by an ordinance duly adopted by the board of aldermen of the town of Spruce Pine, in accordance with the provisions of C. S., 2938. The election at which a majority of the qualified voters of said town approved the issuance of the bonds and the levy and collection of the tax authorized by the ordinance was duly called and held in accordance with the provisions of C. S., 2948.

C. S., 7255, is not applicable to the bonds which defendants in the instant case propose to issue and to sell. Noncompliance with its provisions does not affect the validity of said bonds. There was statutory authority for the issuance of the bonds as well as popular approval, as required by the Constitution of this State. There is no error in the judgment.

Affirmed.

JOHN MORGAN, BY HIS NEXT FRIEND, J. F. ROBINSON, v. MRS. M. A. OWEN AND MORGAN & PERRY.

(Filed 19 December, 1930.)

Judgments F c — In this case judgment, being contrary to verdict, is vacated and verdict set aside and a new trial ordered.

When according to the verdict of the jury the plaintiff is entitled to recover damages in a negligent injury case, and the trial court refuses to sign judgment according to the verdict on the ground that as a matter of law the evidence failed to establish the defendant's negligence as a proximate cause of the plaintiff's injury, and signs judgment for the defendant without disturbing the verdict: *Held*, there being a conflict between the verdict and judgment, the judgment will be vacated, the verdict set aside and a new trial ordered on appeal. *Jernigan v. Neighbors*, 195 N. C., 231, cited and applied.

APPEAL by plaintiff from *Barnhill, J.*, at September Term, 1930, of HAYWOOD. New trial.

The plaintiff, a minor, brought suit by his next friend to recover damages resulting from the collision of a truck owned and operated by Morgan & Perry with an automobile owned and driven by Mrs. Owen. At the close of the plaintiff's evidence the defendants moved to dismiss the action as in case of nonsuit and the motion was denied. The defendants offered evidence and at the conclusion of all the evidence again made a motion for judgment as in case of nonsuit. This motion, also, was denied. The defendants excepted. After considering the evidence under the court's instructions the jury returned the following verdict:

1. Was the plaintiff injured by the negligence of Mrs. M. A. Owen, as alleged in the complaint? Answer: Yes.

MORGAN v. OWEN

2. Was the plaintiff injured by the negligence of D. A. Perry and H. L. Morgan, trading as Morgan & Perry, as alleged in the complaint? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover? Answer: \$6,500.

The judgment recites these facts: "After the return of the verdict, the court being of the opinion as a matter of law that the plaintiff was not entitled to recover against the defendant, Mrs. Owen, for that in the opinion of the court the negligence complained of as to this defendant could not have been one of the proximate causes of the plaintiff's injury; and the court being of the opinion, upon the admission of counsel for plaintiff, that the defendant, H. L. Morgan, only, was liable for the payment of any judgment against the partnership trading as Morgan & Perry, and that the plaintiff, being the minor son of the defendant, H. L. Morgan, could not recover against the defendant, H. L. Morgan, sets the verdict aside as to those defendants by consent. It is therefore considered, ordered and adjudged that the plaintiff take nothing by this action, and pay the costs incurred. And upon the intimation of the court that the verdict would be set aside as to the defendants, H. L. Morgan and D. A. Perry, the plaintiff, through his counsel, takes a voluntary nonsuit as to the defendants H. L. Morgan and D. A. Perry, trading as Morgan & Perry, which is allowed by the court."

The plaintiff excepted to the judgment and appealed.

S. M. Robinson and Morgan, Ward & Stamey for appellant.

Ward & Allen for Mrs. Owen, appellee.

ADAMS, J. The plaintiff took a voluntary nonsuit as to Morgan & Perry, and with the question of their liability we are not concerned.

An entirely different relation exists between the plaintiff and Mrs. Owen. His Honor twice denied her motion for nonsuit, and thereby held as an inference of law that the evidence raised issues for the jury. Accordingly, issues were submitted to the jury and were answered in favor of the plaintiff. When the verdict was returned his Honor expressed the opinion as a matter of law that the plaintiff was not entitled to judgment on the verdict because the negligence of Mrs. Owen could not have been a proximate cause of the plaintiff's injury, and then adjudged that the plaintiff take nothing by his action and pay the costs.

The record thus presents an unusual situation. The essential elements of actionable negligence are injury, negligence, and proximate cause. The court's denial of the motion to nonsuit was in effect an adjudication that the evidence tended to show a causal relation between the defendant's negligence and the plaintiff's injury; and this relation was established by the jury's answer to the first issue. The latter

SHEETS v. STRADFORD.

opinion, set out in the judgment, is altogether inconsistent with the former opinion of the court and with the finding of the jury. It is to be noted that the verdict was not set aside; it is undisturbed. The action was not dismissed as in case of nonsuit; but by a final judgment it was declared that the plaintiff should take nothing by his action. The plaintiff is denied judgment, although there is no interference with the verdict awarding him damages.

Substantially the same conditions arose in *Jernigan v. Neighbors*, 195 N. C., 231. In that case we remarked, "If we simply reverse the judgment, the verdict will stand, and in that event the plaintiff will recover damages to which, according to the judgment, he is not entitled upon the evidence; and as the motion to dismiss the action cannot now be allowed, we are of opinion that the judgment should be reversed, the verdict set aside, and a new trial awarded."

The decision is controlling in this case. The judgment, as it stands, nullifies the verdict; if it is vacated and the plaintiff requests another in accordance with the verdict, he will be confronted with the court's adverse expressions of opinion concerning his right to relief. We, therefore, follow the course pursued in *Jernigan's case*. The judgment is vacated, the verdict set aside, and a new trial ordered.

New trial.

C. M. SHEETS AND E. M. WHITMAN v. Z. B. STRADFORD ET AL.

(Filed 19 December, 1930.)

Reformation of Instruments B a—In this case title of innocent purchaser was not questioned and issues should have been submitted to jury.

Where a senior and two junior mortgages are given on land erroneously described as lot forty-four of a certain plat, and foreclosure has been made under a power of sale in the senior mortgage and the controversy is by the holders of the junior mortgages over the surplus from the sale paid into the office of the clerk of the Superior Court, the powers of the courts of equity relate back to the beginning of the transactions in regard to reforming the instruments upon the ground of mutual mistake or fraud as to the identity of the lot, and it is error for the court to hold that this equity could not be invoked in the present case as the title to the lands was in the purchaser at the foreclosure sale, as the title of such purchaser is not questioned, the matter involved being the distribution of the surplus funds in the clerk's hands.

CIVIL ACTION, before *Stack, J.*, at Special Term, 1930, of FORSYTH.

On 24 June, 1925, Z. B. Stradford and wife executed a deed of trust to A. H. Eller, trustee for D. R. Bryan, to secure a note in the sum of

SHEETS v. STRADFORD.

\$1,000, which said deed of trust was duly recorded. The deed of trust purports to convey "lot forty-four in Block 13 of the Kimberly Park property." Thereafter on 19 January, 1928, said Stradford and wife executed a deed of trust on the same property to secure a note for \$200, which said deed of trust was duly recorded. The plaintiff Sheets is now the owner and holder of said \$200 note. Thereafter said Stradford and wife conveyed the property to Willie E. Pleasants, and Willie E. Pleasants and her husband, W. C. Pleasants, in turn conveyed the property to the defendant, Joe Scales, and Annie Scales. On 9 February, Joe Scales and Annie Scales executed a deed of trust upon the property to W. T. Wilson, trustee for D. R. Bryan, to secure the payment of a note for \$125, and the plaintiff, E. M. Whitman is now the owner of said note. In 1929 A. H. Eller foreclosed the first deed of trust to secure the note for \$1,000, and after paying off said deed of trust and all expenses of sale, including taxes, there remained a balance of \$327.06, which the said trustee Eller paid to the clerk of the Superior Court, and said sum is now held by said clerk pending the determination of the owners of the money.

The plaintiffs as junior mortgagees claim the fund, and the defendant Stradford and wife also claim the fund. Scales and wife filed no answer. The plaintiffs filed an amended petition alleging that the parties intended to describe the property in all the deeds of trust as lot No. 4, block 13, instead of lot No. 44, block 13, and that failure to correctly describe the property was due to the mutual mistake of the parties or draftsman, or the mistake of one party induced by the fraud of the other.

After reading the pleadings and hearing the argument of counsel, the trial judge entered the following decree: "The above entitled cause coming on to be heard at this time, and after the empaneling of the jury and hearing the pleadings read, and the summons showing that this case was started after the sale and deed by A. H. Eller, trustee, in 1929, the court is of the opinion, and so holds, that the plaintiff is not entitled to establish a lien against the funds in question, as he could only establish it against lot No. 4, and that the title of lot No. 4 had passed into the hands of innocent purchasers before this suit was brought. The court holds that under these facts neither plaintiff is entitled to recover any part of the funds now in the clerk's office, whereupon, the court dismisses the action, to which ruling the plaintiffs except and appeal to the Supreme Court. Appeal bond fixed in the sum of \$75.00. Appellant allowed twenty-five days to make up case on appeal and ten days thereafter to the appellees to serve counterclaim or file exceptions.

The court is of the opinion that a correction of the description of the lot could not be enforced now against lot No. 4, it being admitted that lot No. 4 has passed out of the hands of the Stradfords.

SHEETS v. STRADFORD.

Now, therefore, it is ordered, adjudged and decreed that this action be and the same is hereby dismissed; that the costs of this action be taxed against the plaintiffs, and that this cause be remanded to the clerk of the Superior Court of Forsyth County, North Carolina, for disposition."

From the foregoing judgment the plaintiffs appeal.

E. M. Whitman for plaintiffs.

No counsel for defendants.

BROGDEN, J. The case is this: The owner of lot No. 4, block 13, Kimberly Place, executes a deed of trust to secure a note for \$1,000, but the description of the property in the deed of trust identifies the lot as being lot No. 44. Thereafter the same owner executed a second deed of trust upon the same property to secure a note for \$200 held by one of the plaintiffs. The second deed of trust contained the same error of description appearing in the first deed of trust. The owner of the lot conveyed the property by deed containing the same description to a man named Pleasants and Pleasants conveyed to a man named Scales, who gave a third deed of trust upon the property to secure a note of \$125, which note is now held by the other plaintiff in this action.

In February, 1929, the land was sold under power contained in the first deed of trust, and after paying the note therein secured and all charges and taxes, there was a balance of \$327.06 in the hands of the trustee in the first deed of trust, and he paid this sum to the clerk of the Superior Court for the purpose of having the owner of the fund determined. The plaintiffs as holders of the notes secured by the junior deeds of trust assert title to the fund, and the defendant, the original owner of the property, likewise claims the fund. The plaintiffs allege that it was the intention of the parties to describe in said deeds of trust lot No. 4 instead of lot No. 44, and that the error in the description in the deeds of trust was due to mutual mistake or mistake of one party induced by the fraud of the other.

The power of equity created the remedy of reformation for the purpose of correcting errors produced by mutual mistake or mistake of one party induced by the fraud of the other in order that the true intention of the parties might be effectuated, and when equity thus acts upon a transaction, its power thus invoked relates to the beginning of the transaction. *Maxwell v. Bank*, 175 N. C., 180, 95 S. E., 147; *Long v. Guaranty Co.*, 178 N. C., 503, 101 S. E., 11; *Strickland v. Shearon*, 191 N. C., 560, 132 S. E., 462; *Crawford v. Willoughby*, 192 N. C., 269, 134 S. E., 494; *Skinner v. Coward*, 197 N. C., 466, 149 S. E., 682.

The application of the principle of reformation upon the facts disclosed in the record does not affect the rights of the purchaser of the

SMITH v. TEXAS CO.

property under power contained in the first deed of trust, for the reason that the parties are not attempting to set the sale aside or to assert title to the land, but are contending solely and exclusively for the balance of the money which has been paid into the hands of the clerk by the trustee. The plaintiffs are therefore entitled to submit the issues raised to a jury. Therefore, the cause is remanded for trial upon the merits.

Reversed.

F. L. SMITH v. THE TEXAS COMPANY.

(Filed 19 December, 1930.)

Appeal and Error F a—In this case sole exception to Superior Court judgment affirming county court judgment cannot be sustained.

Where an appeal in a civil action is taken from the judgment of a county court to the Superior Court, which affirms the judgment appealed from, on further appeal to the Supreme Court without specific exceptions and assignments of error required by Rule 19 (3) to the proceedings in the Superior Court based on exceptions duly taken and presented in the county court, only matters of law or legal inference will be considered in the Supreme Court, and where the only exception is to the judgment and error does not appear therein, the judgment will be affirmed; and ordinarily when assignments of error are not duly taken and made to appear of record in the Supreme Court, the appeal, on motion, will be dismissed. C. S., 1608(cc).

APPEAL by defendant from *Oglesby, J.*, at October Term, 1930, of BUNCOMBE. Affirmed.

This action to recover damages for the breach by defendant of a contract and lease, with respect to a service station, was commenced in the General County Court of Buncombe County by summons dated 2 April, 1930. It was tried on the issues raised by the pleadings at June Term, 1930, of said court. The issues submitted to the jury at said trial were answered as follows:

"1. Did the plaintiff and defendant enter into a contract and lease for the Alexander Service Station for a period beginning 15 November, 1929, and ending 14 November, 1930, as alleged in the complaint? Answer: Yes.

2. If so, did the defendant breach said contract and lease as alleged in the complaint? Answer: Yes.

3. Did the defendant agree to pay the rent on the service station located on Burnsville Hill, as alleged in the complaint? Answer: Yes.

4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: \$600."

SMITH v. TEXAS CO.

From judgment on the foregoing verdict, signed by the judge of the General County Court of Buncombe County, defendant appealed to the Superior Court of said county. On this appeal defendant duly assigned as error adverse rulings of the trial court on its objections to the admission and exclusion of evidence, and on its motion for judgment as of nonsuit. It also assigned as error certain instructions of the court to the jury, to which it had duly excepted.

This appeal was heard at October Term, 1930, of the Superior Court of Buncombe County by the judge presiding at said term. Defendant's assignments of error on said appeal were not sustained. The judgment of said court was affirmed.

From the judgment of the Superior Court defendant appealed to the Supreme Court.

Edward W. McMahan and Carl W. Greene for plaintiff.
Bourne, Parker, Arledge & DuBose for defendant.

CONNOR, J. The transcript filed in this Court on defendant's appeal from the judgment of the Superior Court contains no grouping of exceptions or assignments of error as required by the rules of this Court. Rule 19(3), 192 N. C., p. 847. Defendant's assignments of error on its appeal from the judgment of the General County Court to the Superior Court of Buncombe County, cannot be considered by this Court. *Davis v. Wallace*, 190 N. C., 543, 130 S. E., 176. By these assignments of error, defendant presented to the Superior Court its contention that the judgment of the General County Court in this action should be reversed, and the action dismissed, or at least that a new trial should be granted, for errors in matters of law, at the trial in the General County Court; this contention was considered and passed on by the Superior Court, in the exercise of its statutory appellate jurisdiction. C. S., 1608(cc). Defendant's contention was not sustained. The judgment of the General County Court was affirmed. Defendant contends that there was error in the hearing of its appeal to the Superior Court, and that for this error the judgment of the Superior Court should be reversed by this Court, to the end that it shall have a new trial in the General County Court.

On an appeal to this Court from the judgment of the Superior Court, affirming or reversing the judgment of the General County Court, in the exercise of its appellate jurisdiction under C. S., 1608(cc), this Court may consider and pass only on the contention of the appellant that there was error in matters of law at the hearing in the Superior Court. This contention must, however, be presented to this Court by assignments of error based on exceptions to specific rulings of the judge of the Superior Court, on the assignments of error appearing in the case on appeal filed

GODFREY v. COACH CO.

in the Superior Court. These assignments of error are based on exceptions taken by the appellant during the course of the trial in the General County Court; they present the appellant's contentions only as to matters of law, and should be passed upon, specifically, by the judge of the Superior Court. *Smith v. City of Winston-Salem*, 189 N. C., 178, 126 S. E., 514. In the absence of assignments of error appearing in the transcript on an appeal to this Court, the appeal will ordinarily be dismissed on the motion of the appellee. Where, however, no error appears in the record proper, the judgment may be affirmed.

In the instant case, the only exception appearing in the record, is to the judgment. We find no error in the judgment. The exceptions cannot be sustained. The judgment is, therefore,

Affirmed.

L. W. GODFREY, ADMINISTRATOR OF PERRY WILSON GODFREY, v.
QUEEN CITY COACH COMPANY.

(Filed 19 December, 1930.)

1. Appeal and Error J g—In this case assumption of parties that verdict was set aside for insufficiency of evidence is deemed correct.

Ordinarily on appeal from an order setting aside a verdict the appellant must show error, but in this case the parties assume that the verdict was set aside for insufficient evidence, and the Supreme Court acts thereon.

2. Trial G a—Where lower court has refused to grant motions of non-suit it is error for it to set aside verdict for insufficiency of evidence.

Where the trial judge has refused to give judgment as in case of non-suit on motions aptly made under the provisions of our statute, it is his holding that there is sufficient evidence to take the case to the jury, subjecting his rulings to exception and appeal, and having thus decided he may not after verdict set it aside for insufficient evidence to support it, and the judgment will be vacated and a new trial ordered.

APPEAL by plaintiff from *Sink*, *Special Judge*, at May Term, 1930, of MECKLENBURG. Error and remanded.

Civil action to recover damages for personal injury resulting in death. The jury found that the death of the plaintiff's intestate was caused by the negligent operation of the defendant's coach as alleged, and assessed the plaintiff's damages; whereupon, on motion of the defendant, his Honor set aside the verdict as a matter of law. The plaintiff excepted and appealed.

Stewart & Bobbitt for plaintiff.

J. Lawrence Jones and N. A. Townsend for defendant.

GODFREY v. COACH CO.

ADAMS, J. The trial court refused to dismiss the action as in case of nonsuit, but set aside the verdict as a matter of law without finding any facts or pointing out any error. The plaintiff excepted and appealed. In *Likas v. Lackey*, 186 N. C., 398, we held that an exception to an order setting aside a verdict as a matter of law cannot be sustained unless error is shown, because the order is presumed to be correct. Ordinarily the rule there stated will be observed; but in this case the briefs of the parties were prepared on the assumption that the reason assigned for vacating the verdict is the insufficiency of the evidence to support it, the plaintiff contending that the evidence is, and the defendant that it is not, sufficient to sustain the finding of the jury. We take this assumption of the parties to be correct.

At the close of the plaintiff's evidence the defendant demurred and moved for judgment as of nonsuit and renewed its motion at the conclusion of all the evidence. Each motion was denied and in each instance the defendant excepted. By refusing to dismiss the action the trial court adjudged that the evidence was of such probative character as to require the jury's answer to appropriate issues. Having in this way twice adjudged the sufficiency of the evidence, should not the court have regarded its judgment on this point as final?

It should be noted that as now enforced the right to demur to the evidence in a cause is conferred by statute. The immediate question, which relates to the scope of the statute and the function of the trial court, was considered and determined in *Riley v. Stone*, 169 N. C., 421. On page 424 it is said: "The motion to dismiss because there is not sufficient evidence to submit the case to the jury when made under the former practice cut off the further introduction of evidence. The statute extended the time for a renewal of the motion to the close of all the evidence. The judge had no power to extend it by amending the statute so as to permit the motion to be made a third time under the guise of 'renewed the motion' after verdict. His decision, twice made, that there was evidence to go to the jury, was final upon that point, subject to exception made and entered at the time."

Chief Justice Pearson remarked in *Stith v. Lookabill*, 71 N. C., 25, a case involving a demurrer under the former practice, "By a demurrer to the evidence the defendant puts the case, which means the exitus, issue, or end of the case, upon the sufficiency of the evidence. The judgment of the court decides the action one way or the other. But by this novel practice (set out in the opinion) the defendant has two chances to one, which is not 'fair play.'" In the case before us the defendant is given three chances to one.

This practice, if indulged, will lead to complications and in some instances to unnecessary appeals. We therefore adhere to the rule stated

CODY v. BARRETT.

in *Riley v. Stone, supra*, that the "decision, twice made, that there was evidence to go to the jury, was final upon that point, subject to exception made and entered at the time."

The order setting aside the verdict is vacated and the cause is remanded for further proceedings.

Error and remanded.

E. C. CODY v. R. C. BARRETT.

(Filed 19 December, 1930.)

Schools and School Districts G a—In this case held: mandamus would not lie to compel county superintendent to approve election of teacher.

The approval of the county superintendent of schools is required for the election of a teacher or assistant teacher in a nonlocal tax school district, and his refusal to approve the election of one on the ground that he did not have sufficiently high certificates as a teacher and that his election as a teacher would not be for the best interests of the school will not sustain the finding of the trial judge that the refusal of the county superintendent of schools to approve the election was arbitrary, capitious and without just cause, and a mandamus to cause his approval is improvidently issued by the lower court. 3 C. S., 5533.

APPEAL by defendant from *Harwood, Special Judge*, at September Term, 1930, of GRAHAM.

Application for writ of mandamus to require the respondent to approve the election of petitioner as teacher of Rock Springs School in Graham County.

The record discloses that on 17 June, 1930, the school committee of Yellow Creek Township in Graham County voted to employ the petitioner, E. C. Cody, as teacher of Rock Springs School at a monthly stipend of \$85, and a majority of the committee, D. Anderson and S. A. Crisp, signed a contract to this effect, but the respondent, as county superintendent, failed and refused to countersign said contract or to approve said election.

The respondent testified that he declined to approve the election of petitioner as teacher of Rock Springs School because said school had previously been taught by persons holding higher certificates than the one held by petitioner, and that he did what he believed to be for the best interests of said school.

The trial court found that the respondent acted "arbitrarily, capiciously and without just cause," and ordered that he approve the election of the petitioner and countersign the contract in question. The respondent appeals, assigning errors.

NETTLES v. REA.

No counsel for petitioner.

Dillard & Hill for respondent.

STACY, C. J.; after stating the case: It is provided by 3 C. S., 5533, that no election of a teacher or assistant teacher by the school committee of a nonlocal tax district shall be deemed valid until such election has been approved by the county superintendent, the executive officer of the county school system. 3 C. S., 5389; *Spruill v. Davenport*, 178 N. C., 364, 100 S. E., 527.

We have discovered no sufficient evidence on the present record to warrant the finding that the respondent acted "arbitrarily, captiously and without just cause." Hence, the application for writ of mandamus should have been denied. *Hayes v. Benton*, 193 N. C., 379, 137 S. E., 169. Mandamus lies only to enforce a clear legal right. *Umstead v. Board of Elections*, 192 N. C., 139, 134 S. E., 409; *Person v. Doughton*, 186 N. C., 723, 120 S. E., 481.

Reversed.

C. B. NETTLES v. RICHARD L. REA AND J. H. REA, GUARDIAN AD LITEM OF
RICHARD L. REA.

(Filed 19 December, 1930.)

Highways B i—Evidence of negligence and contributory negligence held properly submitted to the jury in this case.

Where there is evidence that the plaintiff entered the car of the defendant knowing him to have been drinking, and after he had stated his intention to drive to a nearby city at an excessive rate of speed, and that the defendant attempted to take a curve on the dangerous road at a speed of about seventy miles an hour over the protest of plaintiff, and as a result overturned the car and injured the plaintiff riding therein, there is evidence of wilful and wanton negligence on the part of the defendant, and the evidence is properly submitted to the jury on the issues of negligence, contributory negligence and damages.

APPEAL by defendant from *Moore, J.*, at November Term, 1930, of BUNCOMBE.

Civil action to recover damages for an alleged personal injury, tried upon the usual issues of negligence, contributory negligence and damages, which resulted in a verdict and judgment for the plaintiff.

The plaintiff's evidence tends to show—none was offered by the defendant—that on 9 February, 1930, the defendant invited plaintiff to go with him and two young ladies from Sylva to Asheville, a distance of between fifty and sixty miles, in his new Chrysler automobile. The de-

NETTLES v. REA.

fendant had driven from Asheville that morning in fifty minutes, and he stated that he intended to drive back in thirty minutes. He had taken at least two drinks during the day, which fact was known to the plaintiff, as the plaintiff had been drinking with him, but the defendant showed no signs of intoxication at the time they left Sylva.

It was very cold, and at the suggestion of the defendant, the three guests sat with him on the front seat, rather than use the rumble seat.

Plaintiff testified: The defendant was driving and Miss Knoblauch sat next to him. I was sitting on the outside and Miss Bolter was sitting on Miss Knoblauch and me. He began driving a little faster than I thought safe on the road—that road is awful crooked and rough with numerous curves. The further we got away from Sylva the faster he drove. Miss Bolter and I both protested about the speed he was driving, which was between seventy and eighty miles an hour. I wanted to cut the motor off and stop the car, so we could get out or slow down or something, but I had no opportunity to do so. He wouldn't listen to us about speed, but said he could drive all right. He approached this curve (indicating on map) at about seventy miles an hour—so fast that he was not able to take the curve. The car ran over the embankment, turned and nosed up and down, threw Miss Bolter and me out, rolled over four or five times, went farther than from here to the end of the court room, and stopped with wheels in air.

The plaintiff sustained serious and permanent injuries.

Motion to nonsuit; overruled; exception.

Judgment for plaintiff. Defendant appeals.

*Ellis C. Jones and Zeb F. Curtis for plaintiff,
Campbell & Sample for defendant.*

STACY, C. J., after stating the case: Conceding, without deciding, that plaintiff may have been negligent in entering defendant's car under the circumstances disclosed by the record, nevertheless there is evidence of wilful or wanton conduct on the part of the defendant in persisting in his reckless driving over the protests of his guests which resulted in plaintiff's injury. This, if nothing else, saves the case from a nonsuit. Notes, N. C. Law Review, December, 1930, p. 98; 61 A. L. R., 1253; 1 R. C. L. Sup., 674. See, also, *Teasley v. Burwell*, 199 N. C., 18, 153 S. E., 607; *Albritton v. Hill*, 190 N. C., 429, 130 S. E., 5.

No error.

STATE v. TALLEY.

STATE v. CONNELL TALLEY.

(Filed 19 December, 1930.)

Larceny A b—In this case held: defendant was entitled to have verdict establish value of property stolen.

Under the provisions of chapter 285, Public Laws of 1895, as amended by chapter 118, Public Laws of 1913, the punishment for larceny of goods of less value than twenty dollars is for a misdemeanor, and over that and under certain circumstances is punishable as a felony, the burden being upon the defendant to show a diminution of the sentence, and where he has introduced no evidence and the State's evidence is conflicting, he is entitled to have the value fixed by the verdict of the jury: and *Held*, where this has not been done, a sentence for the commission of a felony is reversible error.

APPEAL by defendant from *Moore, J.*, at March-April Term, 1930, of TRANSYLVANIA. New trial.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Coleman Galloway and Shipman & Arledge for defendant.

ADAMS, J. At the session of 1895 the General Assembly enacted this statute: "In all cases of larceny where the value of the property stolen does not exceed twenty dollars, the punishment shall, for the first offense, not exceed imprisonment in the State's prison or common jail, for a longer term than one year. If the larceny is from the person, or from the dwelling by breaking and entering in the daytime, this section shall have no application. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen." Public Laws 1895, ch. 285; Revisal, 3506.

This act was amended in 1913 so as to read as follows: "The larceny of and receiving of stolen goods knowing them to be stolen, of the value of not more than twenty dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person or from the dwelling by breaking and entering, this section shall have no application: *Provided*, that this act shall not apply to horse stealing: *Provided further*, that this act shall have no application to indictments or presentments now pending nor to acts or offenses committed prior to the ratification of this act. The Superior Court of North Carolina shall have exclusive jurisdiction of the trial of all cases of the larceny of or the receiving of stolen goods, knowing them to be stolen, of the value of more than twenty dollars." Public Laws 1913, ch. 118; North Carolina Code, 1927, sec. 4251.

HARPER v. CONSTRUCTION CO.

The punishment for misdemeanors is prescribed in C. S., 4173, as amended by the Public Laws of 1927, ch. 1: "All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than ten years, or shall be fined." North Carolina Code, 1927, sec. 4173.

The defendant was convicted of the larceny of potatoes charged in the indictment to be of the value of forty dollars. He neither testified nor introduced any witnesses. There was evidence tending to support the State's contention that the value of the property was in excess of twenty dollars; there was other evidence from which the jury might have inferred that the value, as the defendant contended, did not exceed this amount. As the value of the property was a matter of defense, it was incumbent upon the defendant to prove its value in diminution of the sentence. *S. v. Harris*, 119 N. C., 811; *S. v. Dixon*, 149 N. C., 460. He was not, however, required to introduce evidence; he could rely for this purpose upon the evidence offered by the State. *S. v. Gaddy*, 166 N. C., 341.

The trial court inadvertently deprived the defendant of the right to have the value of the property determined by the jury and the grade of the offense ascertained. If the defendant be convicted only of a misdemeanor he cannot be punished as if convicted of a felony. There is no evidence that the offense was an infamous one, or that it was done in secrecy and malice, or with deceit and intent to defraud, and therefore punishable by imprisonment in the State prison. C. S., 4173. Nor is there any evidence that the offense is within any of the exceptions mentioned in C. S., 4251.

New trial.

S. P. HARPER v. MURRAY CONSTRUCTION COMPANY.

(Filed 19 December, 1930.)

Master and Servant C g—In case of sudden peril employee is not held to same degree of care for his own safety as is ordinarily required of him.

Evidence tending to show that the plaintiff was employed by the defendant to level the bottom of a long deep ditch in laying sewer and water mains where he was directed by his foreman to work, and upon the calling of the warning to "look out" suddenly given, he ran straight ahead towards the place where the ditch was caving in and received the injury in suit, and there is testimony that behind him the way was im-

HARPER v. CONSTRUCTION CO.

peded by the crossing of the sewer and water mains within the open ditch which he was afraid to get over or go under: *Held*, sufficient to apply the rule that in case of sudden peril and emergency an employee is not held to the same degree of care for his own safety as under ordinary circumstances, and the case should be submitted to the jury. *Darden v. Laster*, 198 N. C., 427.

CIVIL ACTION, before *Moore, Special Judge*, at February Term, 1930, of GUILFORD.

Plaintiff offered evidence tending to show that on 12 March, 1929, he was working at the bottom of a ditch on Yaquena Street. The ditch was about 300 feet long and 11 feet deep. Rock was found in the bottom of the ditch and this was blasted with dynamite. These blasts were set off at 9 o'clock in the morning, at 12 o'clock, and at about 1 o'clock. Plaintiff was directed by the foreman to go into the ditch with two other men and throw out loose dirt and to grade and level the bottom of the ditch. The ditch had been filled in to a point within five or six feet from the place where plaintiff was working. Between the plaintiff and the point where the ditch had been filled there was a sewer pipe and a water pipe running across the ditch. These pipes were about four feet from the bottom of the ditch. Loose dirt had been falling into the ditch from time to time. The plaintiff testified that about 4:30 or 5:00 o'clock the ditch started to cave in and that Mr. Jordan, the foreman, hollered, 'Look out!' He didn't tell me which way to go. He just hollered, 'Look out.' I couldn't back towards where the sewer pipe had been laid as there were two service pipe lines crossing said ditch at right angles just in the rear of where he was working. Mr. Jordan didn't tell me which way to go, . . . and I ran the clearest way. I was scared to undertake to climb over the pipe and scared to try to go under it—when he hollered, 'Look out.' I was digging at the time, had my head down, and when he hollered I raised up and ran the clearest way. . . . I reckon I ran about 10 feet down it. I didn't have my head down and didn't look up. I was trying to run out of the ditch. . . . I straightened up and ran, and I was running so fast I ran into it."

At the conclusion of plaintiff's evidence the trial judge sustained the motion of nonsuit made by the defendant, from which judgment plaintiff appealed.

O. W. Duke and E. D. Kuykendall for plaintiff.
R. M. Robinson for defendant.

BROGDEN, J. We perceive no essential difference between the principle of law involved in this case and that announced in the case of *Darden v.*

GIBBS v. R. R.

Lassiter, 198 N. C., 427. It was pointed out in the *Darden* case that a variety of circumstances and conditions might enter into the question as to whether the work of fine grading in the bottom of a ditch was "dangerous or otherwise." Upon authority of the *Darden* case, we are constrained to hold that there was sufficient evidence of negligence to be submitted to the jury.

Manifestly, the plaintiff ran the wrong way when the call of danger sounded, because he actually ran to the cave-in instead of away from it. However, he undertakes to explain his conduct by testifying that certain service pipes prevented his retreat to the rear, and that his sole idea was to get out of the ditch. This testimony, if believed by the jury, tends to show that the plaintiff acted in an emergency, and the general rule of law in such cases is that the conduct of a person must be viewed and weighed with such reasonable liberality as the surrounding circumstances may warrant. *Pegram v. R. R.*, 139 N. C., 303, 51 S. E., 975; *McKay v. R. R.*, 160 N. C., 260, 75 S. E., 1081; *Hinton v. R. R.*, 172 N. C., 587, 90 S. E., 756.

Reversed.

W. L. GIBBS v. SOUTHERN RAILWAY COMPANY.

(Filed 19 December, 1930.)

Railroads D b—Evidence of wilful or wanton injury to licensee held insufficient to be submitted to jury in this case.

A person who voluntarily sits for his own convenience upon a freight platform of a railroad company to watch the trains is a permissive licensee to whom the company is not liable except for injuries resulting from its wilful and wanton negligence, and evidence that the employees of the defendant in unloading a car left a plank, used as a gangway, resting between the car and platform, and that the movement of the train dragged it upon and injured the plaintiff as he was sitting on the platform, and that he could have readily observed and avoided the danger, is held: not sufficient to take the case to the jury upon the issue of defendant's negligence, and its motion as of nonsuit should have been allowed.

CIVIL ACTION, before *Moore, J.*, at May Civil Term, 1930, of HENDERSON.

The plaintiff offered evidence tending to show that on or about 22 April, 1929, he was sitting on the edge of the freight platform of defendant. The platform is about 12 feet wide. A track of defendant ran near the platform. The testimony showed that the track was from two to seven feet from the platform. While sitting upon the platform a train of defendant passed by and coupled up with a box car. The box

STATE v. BRYSON.

car had been loaded, but the gang plank which extended from the platform to the car, while it was being loaded, was not removed when the loading was completed. When the engine coupled to the box car and began to move the box car, this gang plank was dragged by the movement of the train and struck the plaintiff, who had his back to the gang plank at the time he was struck. The plaintiff had no business upon the premises of the railroad company, but sat down upon the platform to wait for trains to pass. There is no evidence that the defendant knew of plaintiff's presence. The injury happened in daylight and the moving gang plank was in plain view of plaintiff if he had been looking or paying attention.

At the conclusion of all the evidence the trial judge sustained a motion of nonsuit.

Ray, Redden & Redden for plaintiff.

J. E. Shipman and Jones & Ward for defendant.

BROGDEN, J. What duty does a railroad company owe to a person upon its platform, who has no business upon the premises and is there exclusively for his own convenience?

The injury complained of happened in broad daylight and the moving gang plank was in full view of the plaintiff if he had been exercising any care for his own safety. At most the plaintiff was a bare or permissive licensee, and there is no evidence that the injury resulted from wilful or wanton negligence. Therefore, by virtue of both reason and authority the ruling of the trial judge was correct. *Quantz v. R. R.*, 137 N. C., 136, 49 S. E., 79; *Peterson v. R. R.*, 143 N. C., 260, 55 S. E., 618.

The facts do not bring this case within the principle announced in *Brigman v. Construction Co.*, 192 N. C., 791, 136 S. E., 125, or *Jones v. R. R.*, 199 N. C., 1.

Affirmed.

STATE v. CARTER BRYSON.

(Filed 19 December, 1930.)

Homicide E a—Instruction in this case as to defendant's duty to retreat held erroneous under the evidence.

While ordinarily a homicide is not justifiable upon the plea of self-defense if the accused has reasonable opportunity under the circumstances to retreat and avoid the killing, where the evidence in a prosecution for a homicide tends to show that the deceased had threatened to kill the accused and his wife, and called at their home about midnight,

STATE v. BRYSON.

kicked open the door and renewed his threats, and was killed by the accused firing from his home, an instruction applying the ordinary rule is reversible error.

APPEAL by defendant from *Finley, J.*, at February Term, 1930, of JACKSON.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one Adam Cope.

When the case was called for trial the solicitor announced, in open court, that the State would not insist upon a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter as the evidence might disclose. The defendant entered a plea of not guilty, admitted the killing with a deadly weapon, and offered evidence tending to show that he shot the deceased in defense of himself, his home and his family.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a period of five years.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

E. P. Stillwell and Alley & Alley for defendant.

STACY, C. J. The evidence on behalf of the defendant, so far as material to a proper understanding of the exceptions, tends to show that the homicide occurred at the home of the defendant, Balsam, N. C., in the night-time, about 12:30 o'clock on the morning of 16 December, 1929; that the deceased had previously come to the defendant's home on four different occasions that same night, each time threatening to kill the defendant and his wife, and each time being persuaded to leave; that on his fifth and last visit he paid no attention to the entreaties of the defendant and his wife, kicked open the front door, pointed his gun straight in the doorway and said: "God damn you, I will—" . . . and that the defendant, under these circumstances, while standing in his bedroom, or hallway, shot the deceased and killed him.

The evidence on behalf of the State was to the effect that the defendant was the aggressor, and killed the deceased needlessly or without just cause.

The following excerpt, taken from the charge, forms the basis of one of defendant's exceptive assignments of error:

"The right of self-defense rests upon necessity, real or apparent, and cannot be exercised if there be a reasonable opportunity to retreat and avoid the difficulty, but if the assault in which the killing is brought

BUCHANAN v. FELDSPAR MILLING CO.

about be violent and the circumstances are such that the retreat would be dangerous, he is not required even to retreat."

This instruction is correct as a general proposition of law, but, as applied to the facts of the instant case, it would seem to be inapplicable and misleading. *S. v. Lee*, 193 N. C., 321, 136 S. E., 877; *S. v. Waldroop*, 193 N. C., 12, 135 S. E., 165. The defendant being in his own home and acting in defense of himself, his family and his habitation—the deceased having called him from his sleep in the middle of the night—was not required to retreat regardless of the character of the assault. *S. v. Glenn*, 198 N. C., 79, 150 S. E., 663; *S. v. Bost*, 192 N. C., 1, 133 S. E., 176. This, however, would not excuse the defendant if he employed excessive force in repelling the attack. *S. v. Robinson*, 188 N. C., 784, 125 S. E., 617.

There are other exceptions appearing on the record, worthy of consideration, but as they are not likely to arise on another hearing, we shall not consider them now.

For the error, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

R. B. BUCHANAN v. FELDSPAR MILLING COMPANY.

(Filed 19 December, 1930.)

Pleadings B f—Where pendency of prior action does not appear upon the face of the complaint a demurrer thereto is properly overruled.

Upon a demurrer to a complaint upon the ground of the pendency of a prior action in another county between the same parties upon the same subject-matter, the fact of the pendency of such action must appear in the complaint in order to be sufficient ground for sustaining the demurrer, and an affidavit accompanying the demurrer and stating the facts constituting the grounds thereof is insufficient.

CIVIL ACTION, before *Harding, J.*, at February Term, 1930, of MITCHELL.

On 2 January, 1930, the Feldspar Milling Company instituted an action in Yancey County against Bob Buchanan (R. B. Buchanan), alleging that the said Buchanan was wrongfully cutting timber upon the lands of plaintiff and praying for a restraining order. Buchanan filed an answer denying the pertinent allegations of the complaint. Thereafter, on 16 January, 1930, Buchanan instituted the present action against the Feldspar Milling Company in Mitchell County and filed a complaint alleging that the defendant Milling Company had committed trespass in taking certain timber belonging to the plaintiff. In the

BUCHANAN v. FELDSPAR MILLING CO.

present suit the defendant filed a demurrer upon the ground that the same action is pending in Yancey County concerning the same subject-matter. Appended to the demurrer was a certified copy of the record in the Yancey County case.

The cause came on for hearing, and the trial judge entered a judgment as follows: "And it appearing to the court that the defendant is not entitled to a demurrer upon the grounds set forth, it is, therefore, considered, ordered and decreed that the said demurrer be and the same is, therefore, overruled."

From the foregoing judgment the defendant appealed.

W. C. Berry and R. W. Wilson for plaintiff.

Charles Hutchins for defendant.

BROGDEN, J. The defendant, on 2 January, instituted an action against the plaintiff in Yancey County. Thereafter, on 16 January, the plaintiff instituted the present action against the defendant in Mitchell County upon essentially the same cause of action. The defendant demurs in the Mitchell County suit under C. S., 511, upon the ground that the same action is pending and at issue upon complaint and answer in Yancey County.

Upon this state of facts, the question of law is: Can the pendency of another action between the same parties for the same cause of action, not appearing upon the face of the complaint, be taken advantage of by demurrer?

The law answers the question in the negative. *Alexander v. Norwood*, 118 N. C., 381, 24 S. E., 119; *Allen v. Salley*, 179 N. C., 147, 101 S. E., 545; *Brick Co. v. Gentry*, 191 N. C., 636, 132 S. E., 800; *Lineberger v. Gastonia*, 196 N. C., 445, 146 S. E., 79; *Justice v. Sherard*, 197 N. C., 237, 148 S. E., 241; McIntosh North Carolina Practice and Procedure, p. 451, sec. 440. In McIntosh, *supra*, the author says: "If it appears upon the complaint that there is another action pending between the same parties for the same cause, it is ground for demurrer, and if it does not so appear the objection is made by answer. This does not mean that the suits must be between the same parties as plaintiffs and defendants, and about the identical cause of action; but if the parties are the same, either as plaintiffs or defendants, though there may be other parties also, and the actions are substantially alike, so that the relief asked for in the second action can be given in the first, the objection will be sustained, in order to avoid a multiplicity of suits."

The defendant relies upon the case of *Allen v. Salley*, 179 N. C., 147, but the original record in that case discloses that the pendency of another suit was expressly pleaded by answer and not by demurrer.

Affirmed.

PARSONS v. R. R.

WINNIE PARSONS, BY HER NEXT FRIEND, W. H. PARSONS, v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 19 December, 1930.)

1. Carriers D b—In this action to recover for misinformation as to cost of fare a demurrer ore tenus is allowed in the Supreme Court.

Where in an action against a railroad company the complaint alleges that the plaintiff, informed of the amount of fare for a proposed trip by the company's agent in another state, reckoned that she had sufficient money for the trip, and went to the ticket agent at the point of departure, and was misinformed by him of the amount of the fare, and that she voluntarily paid him the erroneous amount named by him, which was in excess of the correct amount, and started on the trip, and that as a result she was without sufficient money for food, hotels, etc., en route, is *held*: insufficient to warrant a recovery against the railroad for the inconvenience caused by the lack of money, and a demurrer *ore tenus* on the ground that the complaint failed to state a cause of action, made in the Supreme Court, will be sustained.

2. Appeal and Error J g—Where a demurrer ore tenus is allowed in the Supreme Court the question of venue raised on appeal is immaterial.

In this case the demurrer of the defendant made in the Supreme Court on appeal on the ground that the complaint failed to state a cause of action being allowed: *Held*, the question of venue appealed from became immaterial.

CIVIL ACTION, before *Finley, J.*, at July Term, 1930, of ASHE.

The plaintiff instituted this action in Ashe County and alleged that on or about 9 November, 1922, she and her mother, grandmother, and a brother and sister desired to make a trip from West Jefferson, North Carolina, to Linden, Alabama. Relying upon information from some railroad company's agent in Rembust, Alabama, the parties provided what they thought were sufficient funds to make the trip. The parties sought to purchase a ticket at Abingdon, Virginia, to Linden, Alabama, from the defendant's agent in Abingdon, Virginia. Said agent informed the plaintiff that the railroad fare from Abingdon, Virginia, to Linden, Alabama, would be \$135, when in fact said fare was only \$81. However, the plaintiff, her mother, and grandmother paid the \$135 and started on the journey. As a result they were without sufficient funds to pay hotel bills or lodging, or to procure the necessary food. Wherefore, plaintiff alleges that by reason of such inconvenience and suffering, plaintiff has been damaged in the sum of \$3,000.

The defendant entered a special appearance and moved to dismiss the action because of improper venue, alleging that the cause of action arose in Virginia, and that the plaintiff was not a resident of the State of North Carolina. The cause was heard upon said motion and the trial judge found the following facts:

BROOM v. BOTTLING CO.

1. That the alleged cause of action arose and occurred in Abingdon, Virginia.

2. That the plaintiff at the time the alleged cause of action arose was a nonresident of the State of North Carolina.

3. That neither Ashe nor any other county in the State of North Carolina adjoins the county in which the alleged cause of action arose.

Whereupon, it was ruled that C. S., 468, was applicable and the motion to dismiss was denied.

From the foregoing judgment the defendant appealed.

At the hearing of the appeal in the Supreme Court the defendant demurred *ore tenus* upon the ground that the complaint did not state a cause of action.

T. C. Bowie for plaintiff.

F. M. Rivinus, Burton Craige, Ira T. Johnston and Murray Allen for defendant.

BROGDEN, J. Both the plaintiff and the defendant are nonresidents of North Carolina, but the question of proper venue upon the facts disclosed becomes immaterial if the demurrer *ore tenus* should be sustained. It is manifest upon the facts appearing in the record that the plaintiff and those composing her party undertook a long trip by rail after full knowledge that they had no funds to procure necessary food and lodging. Moreover, they paid the exacted fare voluntarily before the journey began. As the cause of action rests exclusively upon lack of sufficient money to procure reasonable comforts while traveling, we are of the opinion, and so hold, that the demurrer *ore tenus* should have been sustained. *Snipes v. Monds*, 190 N. C., 191, 129 S. E., 413; *Seawell v. Cole*, 194 N. C., 546, 140 S. E., 85.

Reversed.

G. W. BROOM v. MONROE COCA COLA BOTTLING COMPANY.

(Filed 19 December, 1930.)

1. Food A a—Exclusion of evidence that bottler had no previous knowledge of foreign substances in drinks held proper.

In an action to recover damages from a bottling company for injury caused by harmful substances in a bottle of its beverage, evidence tending to show that the company had not been told by its vendees or drivers that deleterious substances had been formerly found in the bottled drinks is properly excluded.

BROOM v. BOTTLING CO.

2. Evidence K b—In this case held: testimony of witness was properly excluded as opinion evidence invading province of jury.

Where injury is shown by the purchaser of a bottled beverage caused by harmful substances found within the bottled drink, the opinion of a witness that foreign substances could not have escaped into the bottles on account of the character of the machinery used is objectionable as invading the province of the jury.

CIVIL ACTION, before *McElroy, J.*, at August Term, 1930, of UNION.

The plaintiff offered evidence tending to show that on 19 July, 1929, he bought a bottle of coca cola from G. W. Helms, a merchant. He opened the bottle and began drinking the beverage when he discovered that there was some foreign substance in the drink. Upon examination it was discovered that the bottle contained broken glass and oil. There was further evidence tending to show that the plaintiff immediately became violently sick and was attended by a physician, and that later glass passed through his stomach and bowels, causing internal laceration and great pain and suffering. The plaintiff offered evidence tending to show that on or about 19 July, 1928, a bottle of coca cola bottled by defendant contained a chew of tobacco, and that in March or April, 1929, another bottle of coca cola bottled and sold by the defendant contained a fly, and there was other testimony that other bottles contained paper and trash.

The defendant offered evidence tending to show that the plant at which said beverage was bottled and prepared for sale was modern and up-to-date in every particular and equipped with the best machinery available for bottling purposes, and that every precaution was taken in the process of bottling coca cola to keep the bottles clean and eliminate all foreign substances from the bottled product.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff, who was awarded the sum of \$2,000 damages.

From judgment upon the verdict the defendant appealed.

John C. Sikes and C. E. Hamilton for plaintiff.
Vann & Milliken for defendant.

BROGDEN, J. The measure of liability imposed by the law upon the bottler and seller of coca cola has been established in *Perry v. Bottling Co.*, 196 N. C., 175, 145 S. E., 14; *Perry v. Bottling Co.*, 196 N. C., 690, 146 S. E., 805; *Harper v. Bullock*, 198 N. C., 448, 152 S. E., 405. See, also, Annotation, 63 A. L. R., p. 340.

The evidence brings this case within the rule of liability announced in the *Perry cases*, *supra*.

BOARD OF EDUCATION v. ANDERSON.

The trial judge declined to permit the defendant to offer evidence to the effect that it had received no notice from any vendee of coca cola or from its drivers, with respect to any foreign substances contained in beverage so bottled and sold. Exception to this ruling cannot be sustained. The identical point was discussed in *Cashwell v. Bottling Works*, 174 N. C., 324, 93 S. E., 901. It is written in that case: "A seller may not have knowledge of the danger lurking in his goods, but this matter of knowledge may be produced by his failure to exercise proper care to acquire it; and knowledge is not an essential or requisite element of liability for the consequence, if the dangerous character of goods could be eliminated by the use of that degree of care which the law required of him under the circumstances."

The defendant also assigned as error the ruling of the trial judge excluding the testimony of a witness for the defendant to the effect that in his opinion the glass found in the bottle could not have passed through defendant's bottling machine. This ruling is correct for the reason that such testimony plainly invaded the province of the jury.

We have examined all the exceptions and find no reversible error.

No error.

BOARD OF EDUCATION OF GRAHAM COUNTY v. D. ANDERSON AND
S. A. CRISP.

(Filed 19 December, 1930.)

Judgments F c—Judgment in this case held erroneous as being inconsistent.

Where the county board of education orders the removal of school committeemen, C. S., 5458, who appeal under the provisions of C. S., 5427, the judgment of the Superior Court judge holding the act of the board of education in removing the committeemen invalid and dismissing the appeal for want of jurisdiction is inconsistent and erroneous.

APPEAL by plaintiff from *Harwood, Special Judge*, at September Term, 1930, of GRAHAM.

Proceeding to remove D. Anderson and S. A. Crisp as school committeemen of Yellow Creek Township, Graham County, for cause under 3 C. S., 5458.

From an order of removal made by the county board of education of Graham County, the said committeemen appealed to the Superior Court, asserting their right to do so under 3 C. S., 5427.

ELIZABETH CITY v. AYDLETT.

From a judgment dismissing the appeal for want of jurisdiction, but holding that the action of the board of education in removing said committeemen, was invalid and without force and effect, the board of education of Graham County appeals, assigning error.

Dillard & Hill for plaintiff.

R. L. Phillips for defendants.

STACY, C. J. There was error in dismissing the appeal for want of jurisdiction, and at the same time holding that the order of removal made by the board of education was void. The two rulings would seem to be inconsistent.

Error.

CITY OF ELIZABETH CITY v. A. L. AYDLETT.

(Filed 19 December, 1930.)

Municipal Corporations H e—Under statutory authority a city may enjoin the violation of its zoning ordinance.

Section 8, chapter 250, Public Laws of 1923, permits the issuance of a restraining order in favor of a city against the erection and maintenance of a filling or gasoline station contrary to its ordinance, and the refusal to issue such restraining order on the ground that the remedy of the city for the violation of its zoning ordinance is by indictment alone is erroneous.

APPEAL by plaintiff from *Cranmer, J.*, 23 April, 1930, at Columbia. From PASQUOTANK.

Civil action to restrain the defendant from completing a gasoline filling or gasoline storage station, and from operating same in violation of a zoning ordinance, adopted pursuant to chapter 250, Public Laws 1923.

From a judgment dissolving the temporary restraining order on the ground that indictment, and not injunction, is the only available remedy, plaintiff appeals, assigning error.

J. B. Leigh and Thompson & Wilson for plaintiff.

M. B. Simpson and McMullan & LeRoy for defendant.

STACY, C. J. Section 8 of chapter 250, Public Laws 1923, provides that in case any building or structure is erected or maintained in violation of any ordinance or regulation adopted in pursuance thereof, the proper authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceeding to restrain or abate

PUGH v. SCARBORO.

such unlawful erection, maintenance, occupancy or use, and to prevent any illegal act in connection therewith.

This differentiates the case from *Elizabeth City v. Aydlett*, 198 N. C., 585, 152 S. E., 681, and the trial court was in error in holding that plaintiff was precluded from testing the matter by injunction. 14 R. C. L., 379.

The validity of the ordinance is not involved on the present appeal. The appropriateness of the remedy selected by plaintiff is the only question presented for decision.

Error.

A. C. PUGH v. J. M. SCARBORO, ELLEN SCARBORO, J. H. MARLEY,
H. A. MOFFITT AND J. P. ROUTH.

(Filed 19 December, 1930.)

1. Usury C b: Evidence J a—Parol evidence is admissible to show usury although note on its face purports to carry only legal rate.

No device to avoid our usury statute will be permitted to defeat its purpose, and in an action to recover on a promissory note or bond appearing on its face to be given for a lawful rate of interest, it may be shown by parol that an amount called a bonus had been deducted, and when this bonus has not been received by the payee the maker of the note may set up the usury statute, and the plaintiff in the action upon the note will forfeit the amount of the bonus regarded as interest, and making the transaction an usurious one.

2. Limitation of Actions A c—Where action is brought on note the defense of usury is not barred by lapse of two years.

Where the payee of a promissory note or bond brings action thereon and the defendant sets up a deduction on account of usury, the two-year statute of limitations will not bar his defense, and within the plain intent and meaning of the statute the plaintiff will not be entitled to recover the usurious charge. Actions brought to recover usurious interest distinguished. C. S., 442(2), 2306.

APPEAL by plaintiff from *Clement, J.*, at July Term, 1930, of RANDOLPH. Affirmed.

Civil action by plaintiff against defendants to recover on the following bond:

“\$1,800.00.

Greensboro, N. C., August 17, 1927.

One year after date we, the undersigned J. M. Scarboro and Ellen Scarboro as principals, and H. A. Moffitt, J. H. Marley and J. P. Routh as sureties, promise to pay to the order of A. C. Pugh the sum of eighteen hundred dollars for value received, with interest from date at the rate of six per cent per annum, interest payable semiannually.

PUGH v. SCARBORO.

We, the makers and endorsers, waive demand, protest and notice. All demands and offsets against the payee herein named are waived in favor of any bona fide holder.

J. M. SCARBORO.	(Seal.)
ELLEN SCARBORO.	(Seal.)
J. H. MARLEY.	(Seal.)
H. A. MOFFITT.	(Seal.)
J. P. ROUTH.	(Seal.)

The prayer of plaintiff is as follows: "Wherefore, plaintiff prays judgment against the defendants for the sum of \$1,800, and interest on \$1,800 from 17 August, 1927, at six per cent per annum, payable semi-annually, until paid; for the costs of the action, and for such other and further relief as he may be entitled to."

The record discloses that J. M. Scarboro, H. A. Moffitt and J. P. Routh signed the note (a nonsuit was granted as to Ellen Scarboro), but set up the defense that the note is tainted with usury. "That the plaintiff agreed to lend the principals on the said note \$1,800 for one year; that when the proceeds of the said note were paid out to the said principals the plaintiff only paid to the said principals on the said note the sum of \$1,650, retaining \$150 as interest; that this interest was deducted from the loan at its inception and before any interest had been earned, and, therefore, represented an additional usurious charge of six per cent on \$150 for a year, or \$9, making the total usurious part of this loan \$159; that these defendants are advised, informed and believe that the plaintiff, having charged an illegal and usurious rate of interest, forfeits all interest."

The plaintiff, in reply denies the allegations as set up in the defense and says: "That the plaintiff agreed to loan to the defendants, J. M. Scarboro and Ellen Scarboro, the sum of \$1,800 upon their promising to pay to him the sum of \$150 as a bonus for said loan; that the plaintiff did loan to the said J. M. Scarboro and Ellen Scarboro the sum of \$1,800, but in the exchange they either paid him \$150 or he retained said amount for said bonus, in accordance with the agreement theretofore made; that the defendants, J. M. Scarboro and Ellen Scarboro, did not pay the plaintiff any more than they had agreed to pay him in order to get the loan. That more than two years has elapsed since defendants' cause of action as set up in the further defense and counterclaim accrued to them to the beginning of this action, and the same is pleaded in bar of defendants' further defense, counterclaim and recovery in said action."

The plaintiff introduced evidence as to the execution of the note by defendants, introduced the note and rested.

PUGH v. SCARBORO.

J. M. Scarboro, for defendants, testified in part: "I live in Greensboro, and signed the note marked Exhibit 'A.' I had no agreement with A. C. Pugh with reference to the interest that was to be paid on the loan more than what was stipulated; that is to pay the interest, 6 per cent, nothing else. I received \$1,650 on that loan. Q. What was your agreement with Mr. Pugh about what you were to pay him for the use of this \$1,800? Plaintiff objects; overruled; exception. A. I borrowed \$1,650 from him and was to pay him 6 per cent interest. For the loan of \$1,650, I signed this note and this note is what I received the \$1,650 for. I saw Mr. Pugh; I don't remember just exactly what was said by both of us, but I gave him the note for \$1,800, and he gave me \$1,650."

The issues submitted to the jury and their answers thereto were as follows:

"1. Is the defendant, J. M. Scarboro, H. A. Moffitt, J. P. Routh, indebted to the plaintiff, and if so, in what amount? Answer: \$1,650.

2. Did the plaintiff charge usurious interest in the loan of money, as alleged in the answer? Answer: Yes.

3. Is the defendants' counterclaim alleging the charge of usury barred by the statute of limitations? Answer: No."

On the above testimony the court below, after reciting Scarboro's evidence, charged the jury, in part, as follows: "So, gentlemen, if you believe this testimony, you will answer the first issue, \$1,650, the second issue, 'Did the plaintiff charge usurious interest in the loan of money, as alleged in the answer?' Yes; the third issue, 'Is the charge of usury barred by the statute of limitations?' No."

The judgment of the court below was as follows: "This cause coming on to be heard at July Term, 1930, of the Superior Court of Randolph County, before his Honor, J. H. Clement, Judge, and a jury, and the jury having answered the issues submitted to them as follows: (See above issues.) It is considered and adjudged that the plaintiff, A. C. Pugh, recover of the defendants, J. M. Scarboro, H. A. Moffitt, and J. P. Routh, the sum of \$1,650, together with the costs of the action, to be taxed by the clerk."

The plaintiff duly excepted and assigned error to the testimony of Scarboro, as above set forth, and the charge of the court as above set forth, in which the court below charged in effect that plaintiff's plea of the statute of limitations was not applicable, and appealed to the Supreme Court.

J. A. Spence for plaintiff.

Austin & Turner for defendants J. M. Scarboro, H. A. Moffitt and J. P. Routh.

PUGH v. SCARBORO.

CLARKSON, J. This is an action brought by plaintiff against the defendant to recover on a bond for \$1,800, dated 17 August, 1927, due one year after date. This action was instituted on 26 October, 1929, in which plaintiff prays judgment against the defendants for \$1,800 and interest from 17 August, 1927, at 6 per cent per annum, payable semi-annually. The defendants set up the plea of usury. That although the bond was executed for \$1,800, only \$1,650 was borrowed and actually received, plaintiff retaining \$150 as interest, and the note bore 6 per cent. The plaintiff called it in his reply "\$150 as a bonus for said loan."

Plaintiff contends (1) That the testimony of Scarboro in regard to the loan was incompetent, "For parol evidence is not admissible to vary, explain or contradict an agreement in writing." This principle is ordinarily applicable, but not so when there is a plea of usury and the evidence is to the effect that the agreement is usurious. In fact, plaintiff admits that the \$150 was a bonus for the loan. A bonus is something given in addition to what is ordinarily received by, or strictly due to, the recipient.

In *Bank v. Wyssong*, 177 N. C., at p. 388, speaking of a transaction alleged to be usurious, we find: "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguises, and decided according to its substance, and its necessary tendency and effect, when the purpose and intent of the lender are unmistakable. This is the correct rule." *Ripple v. Mortgage Corp.*, 193 N. C., at p. 424.

In this jurisdiction usury has always been condemned by our statutes and is *contra bonas mores*. Formerly the forfeiture was greater than our present statute. In some states it is indictable to charge usury.

We find in *Glisson v. The Executors of Newton*, 2 N. C., at p. 337, the following: "We have in fact been averse to declaring this to be a case of usury within the act, because in that event, the principal sum secured by this bond, which is a just debt, will be lost as well as the unlawful interest secured by the note, but the authorities in the books are too strong to be surmounted. Any shift or device whatsoever, to take more than the interest allowed, and particularly the device of securing the principal and interest by distinct assurances, is incompetent to the purpose of taking the case out of the operation of the act. If the contract itself, is upon the whole face of it, a contract to have a greater premium than the law allows, it is void, whether it remains a parol contract, or becomes clothed with legal solemnities; as is, also, every security or assurance founded upon it, whether one only, or more. This is the true meaning of the act."

PUGH v. SCARBORO.

"As a general proposition where the inquiry is whether a contract is usurious it is open to evidence dehors the written agreement to show that, though legal on its face, it was in fact an illegal agreement. Otherwise the very purpose of the law in forbidding the taking of usury under any cover or pretext would be defeated." 27 R. C. L., sec. 13 (Usury), p. 212.

We think on the whole pleadings and evidence that the loan was usurious and such transactions condemned by the statute. We think the testimony of Scarboro competent, and this assignment of error cannot be sustained.

Plaintiff contends (2) That the plea of the statute of limitations was applicable. We cannot so hold. Plaintiff pleaded the two-year statute in bar of recovery. Our statutes on the subject of usury: "The penalty for usury is a forfeiture of all interest where no interest has been paid, and double the amount of interest paid when any payment has been made. The borrower may plead usury in an action upon the debt, to prevent the recovery of any interest; and he may sue to recover double the amount of interest paid, or set this up as a counterclaim in an action for the debt. An action to recover the penalty, or using it as a counterclaim, must be within two years, but no date is given from which the time is to be counted. Before 1895 the statute read, 'two years from the time the usury was paid,' and it was held not to be necessary for the defendant to plead this lapse of time, but the plaintiff must show that his action was brought within the time. By the act of 1895, the limitation was 'two years after payment in full of the indebtedness.' Under the present statute, where there was a contract with a bank involving usury, and the dealings were such as to constitute an open, mutual, and current account, the statute would run from the last item; but where usury was paid on a debt each year for several years, and the debt was extended each year, it was held that each payment was a separate transaction, and the statute ran from the date of each payment. This is the rule-adopted before 1895." N. C. Prac. & Proc. (McIntosh), sec. 188, at p. 170. C. S., 2305 and 2306.

C. S., 442, is as follows: "Within two years: (1) All claims against counties, cities and towns of this State shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon. (2) An action to recover the penalty of usury."

This is not an action brought by defendants to recover the penalty for usury, "twice the amount paid," which interest has already been paid, for this action must be brought within two years. C. S., 2306.

PUGH v. SCARBORO.

Further, C. S., 2306, in part, is as follows: "The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon."

The bonus or interest on the bond sued on has not been paid. This bond being tainted with usury, under the statute, forfeits the entire interest. The plaintiff comes into court to enforce a contract condemned by the statute, when he does this courts of law and equity say he cannot enforce this contract further than is permitted by the statute which condemns the charging of a greater rate of interest than six per centum per annum. When plaintiff brings an action to recover on the bond, he can recover the principal alone, he can do only what the statute permits—nothing more.

The matter is thus stated in *Ripple v. Mortgage Corp.*, *supra*, at p. 424-5: "In North Carolina the penalty as prescribed by statute, for taking, receiving, reserving, or charging for the use of money a sum in excess of interest at the legal rate is forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid. The forfeiture will be enforced against the usurer, when he seeks to recover upon the usurious contract or transaction. His debt will be stripped of all its interest-bearing quality, and he will be permitted to recover only the principal sum loaned. If a sum in excess of interest at the legal rate has not only been charged by the lender, but has also been paid by the borrower for the use of the money, then the person, or his legal representative, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt. C. S., 2306. *Sloan v. Ins. Co.*, 189 N. C., 690; *Waters v. Garris*, 188 N. C., 305."

The humanities of all civilized nations has condemned usury, a species of ingenious oppression, especially in this day. It may be well for us to hark back to the Mosaic law, where we find: "If thy brother be waxen poor, and fallen in decay with thee, then thou shalt relieve him; yea, though he be a stranger, or a sojourner, that he may live with thee. Take thou no usury of him, or increase, but fear thy God, that thy brother may live with thee. Thou shalt not give him thy money upon usury, nor lend him thy vituals for increase." Lev. XXV, 35-37.

For the reasons given the judgment below is

Affirmed.

DEPENDENTS OF PHIFER *v.* DAIRY.

DEPENDENTS OF H. T. PHIFER, EMPLOYEE, DECEASED, *v.* FOREMOST DAIRY, INC., EMPLOYER, AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER.

(Filed 19 December, 1930.)

1. Master and Servant F b—Evidence that injury arose out of and in the course of employment held sufficient.

Where the employee of a dairy company uses his own automobile in the employer's service, the gasoline furnished by the employer under an agreement that the employee was thus to be transported to and from his work, evidence that the employee received an injury while going to his work in the automobile according to the agreement is sufficient to sustain a finding of the Industrial Commission that the injury arose out of and in the course of the employment under the provisions of the Workmen's Compensation Act.

2. Same—An injury received in going to work where transportation is a part of the contract of employment is one in course of employment.

The words "out of and in the course of employment" as used in the Workmen's Compensation Act refer to injuries which follow as a natural incident of the work within the employee's duties and which may reasonably be contemplated as a result of the exposure occasioned by the nature of the employment, and extends to such as may arise while the employee is going to and from his work by being transported under the circumstances as a part of the employment contract.

APPEAL by defendants from *Harwood*, *Special Judge*, at October Special Term, 1930, of MECKLENBURG. Affirmed.

This is an appeal from a judgment of the Superior Court affirming an award to the dependents of the deceased employee, by the North Carolina Industrial Commission.

H. T. Phifer had been in the service of Foremost Dairy, Inc., as route foreman for several years. His home was about three miles from the plant. He collected the company's accounts, sometimes delivered milk, and was subject to call at any time after 3 a.m., as a substitute for any regular driver who failed to report for duty. Prior to 1 January, 1930, he owned a car; but the employer maintained it and furnished gasoline and oil for its operation. Between 1 January and his death the employee used a truck which had been provided by the employer for use in the performance of the employee's duties and in his going to and from his home to the company's plant.

It was admitted that the employee left his home, which was southwest of the city of Charlotte, about 6:30 a.m., 9 February, 1930, driving the company's truck, and that as he entered the intersection of West Morehead Street and Mint Street the truck was struck by an automobile and he was killed.

DEPENDENTS OF PHIFER v. DAIRY.

The defendants denied that the relation of employer and employee existed at the time of the injury; denied, also, that if such relation existed, the injury arose out of and in course of the employment.

J. Lawrence Jones for appellants.

Taliaferro & Clarkson for appellees.

ADAMS, J. The appellants admit that the employee was killed while in the service of Foremost Dairy, Incorporated, and from the evidence adduced the Industrial Commission found as a fact that the deceased sustained fatal injury as the result of an accident that arose out of and in the course of his employment while being transported in a conveyance furnished by the employer as a part of the contract of employment. As the finding that the conveyance was furnished as a part of the contract is supported by the evidence, it is "conclusive and binding." Workmen's Compensation Law, sec. 60. The decisive question is whether the employee's death resulted from injury by accident arising in the course of and out of the employment.

In *Harden v. Furniture Co.*, 199 N. C., 733, we said that while the phrase "in the course of" refers to time, place, and circumstance, the words "out of" refer to injuries which follow as a natural incident of the work and which may reasonably be contemplated as a result of the exposure occasioned by the nature of the employment, and that if an employee has sustained an injury which might have been contemplated by a reasonable person as incidental to the service when he entered the employment, the injury may be said to have arisen out of the employment; and in *Wilkie v. Stancil*, 196 N. C., 794, we held that an employee, who owned a car which he used regularly in going to and from the place where he worked, was not, while going there, engaged in the furtherance of his employer's business.

The latter decision is grounded in the principle that the relation of master and servant is usually suspended when the servant, at the end of his day's work, leaves the place of his actual employment and is resumed when the servant puts himself in a position where he can again do the work at the place where it is to be performed. *Rourke's case*, 129 N. E. (Mass.), 603. So it is held as a general rule that an injury suffered by an employee while going to or coming from the employer's premises where the work is carried on does not arise out of his employment so as to entitle him to compensation. *Podgorski v. Kerwin*, 175 N. W. (Minn.), 694; *Nesbitt v. Twin City Forge and Foundry Co.*, 177 N. W. (Minn.), 131.

To this rule there are exceptions. While there is diversity of opinion on the question, the weight of authority sustains the conclusion that if

DEPENDENTS OF PHIFER v. DAIRY.

an employer furnishes transportation for his employee as an incident of the employment, or as a part of the contract of employment, an injury suffered by the employee while going to or returning from the place of employment in the vehicle furnished by the employer and under his control arises out of and in the course of the employment. *Fisher v. Tidewater Bldg. Co.*, 116 At., 924; *Harrison v. Central Con. Corporation*, 108 At. (Md.), 874; *Scalia v. American Sumatra Tobacco Co.*, 105 At. (Conn.), 346; *Swanson v. Latham*, 101 At. (Conn.), 492; *Donovan's case*, 104 N. E. (Mass.), 431; *American Coal Mining Co. v. Crenshaw*, 133 N. E. (Ind.), 394; *Dominquez v. Pendola*, 188 Pac. (Cal.), 1025; *Littler v. George A. Fuller Co.*, 119 N. E., 554; 62 A. L. R., 1438, annotation.

It is said in *Donovan's case*, *supra*: "There have been several decisions in England as to when and how far an employee can be said to have been in the employ of his master, while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment. Many of these decisions have been cited and discussed by Professor Bohlen in 25 Harvard Law Review, 401 *et seq.* From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. . . . The finding of the Industrial Accident Board that Donovan's transportation was 'incidental to his employment' fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real, feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract have been shown by either party, but everything is left to be inferred from their conduct. That was the reasoning of this Court in such cases as *Gilshannon v. Stony Brook R. R.*, 10 Cush., 228, 231; *McGuirk v. Shattuck*, 160 Mass., 45, 47, 35 N. E., 110, 39 Am. St. Rep., 454; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass., 93, 98, 64 N. E., 726; *Kilduff v. Boston Elev. Ry.*, 195 Mass., 307, 81 N. E., 191, 9

DEPENDENTS OF PHIFER v. DAIRY.

L. R. A. (N. S.), 873; and *Feneff v. Boston & Maine R. R.*, 196 Mass., 575, 577, 82 N. E., 705. Accordingly we are of opinion that the Industrial Accident Board had the right to draw the inference that Donovan's injury arose out of and in consequence of his employment."

In *Harrison v. Central Con. Corporation*, *supra*, the Court remarked: "When the injury occurs before the beginning or after the termination of work there are two general rules applicable to the question as to whether it arose out of and in the course of the employment. The first is that an employee while on his way to work is not in the course of his employment. The second is that where the workman is employed to work at a certain place, and as a part of his contract of employment there is an agreement that his employer shall furnish him free transportation to or from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation it is held to have arisen out of and in the course of the employment."

Also in *American Coal Mining Co. v. Crenshaw*, *supra*: "From the foregoing authorities the general rule seems to be that where the conveyance for the employees has been provided by the employer, after the real beginning of the employment, whether such conveyance be his own or is one used for his benefit by virtue of a contract with another, the same being in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of their contract of employment, the employer is liable."

A similar conclusion was reached in *Campagna v. Ziskind*, 135 At. (Pa.), 124: "So also when, to secure a service and as a part of the consideration, it is agreed that transportation shall be supplied to or from the place of work, the right to compensation is fixed by the beginning of the journey to such point, or the ending of it upon return."

The fact that the deceased was the driver of the truck does not modify the principle. The vehicle was furnished by the employer as a "real feature" of the contract and "may be regarded as having been adopted by the parties as one of its terms," the period of service continuing during the time of transportation. As pointed out in *Rachels v. Pepoon*, 135 At., 684, while the employee's actual work began at a designated place, yet to go there was an act within and necessary to his service.

Some of the earlier English cases have been modified or overruled by later English decisions; but doubt has been expressed whether any American court will adopt the present English view, because of the large number of American decisions. Annotation, 162 A. L. R., 1446. Judgment

Affirmed.

STATE v. NELSON.

STATE v. JAMES P. NELSON, JR.

(Filed 19 December, 1930.)

Criminal Law G r—A character witness may not be asked on cross-examination whether he would commit the offense charged against the defendant.

While cross-examination of a witness is very broad in its scope it will not be allowed to call for the opinion of a character witness upon the matter included in the determination of a controversy, as in this prosecution for false pretense, after the witness had only testified to the general character of the defendant charged with procuring a second note for the company for which he was an officer for the same debt and wrongfully using them both, a question asked on cross-examination if the witness would do the same thing is not for the purpose of impeaching him, but to place before the jury the witnesses' opinion upon the charge against the defendant laid in the indictment.

CRIMINAL ACTION, tried before *Harwood, Special Judge*, at February Term, 1930, of FORSYTH.

The defendant was indicted for false pretense. On or about 19 October, 1929, J. R. Jones bought an automobile from the Lindsay Fishel Buick Company. There was a balance of \$552 due on the purchase price and said Jones executed a note for \$552 and delivered the same to the defendant James P. Nelson, Jr., who was secretary and treasurer of the corporation. The maturity of the note was 17 January, 1930. Thereafter on 7 November, 1929, Jones was in the place of business of the Buick Company and Nelson approached him and asked him if he would give a new note to replace the old note for the reason that the company had not been able to discount the old note. Thereupon said Jones executed a note for \$583.41 to the General Motors Acceptance Corporation, which said note included the \$552 note and a premium on an insurance policy. Jones testified that Nelson promised to mail the old note to him that afternoon. About a week later Jones called Nelson over telephone and asked him to mail the old note and Nelson promised to do so. On 1 December Jones went to Nelson's place of business and asked Nelson for the old note, and Nelson stated that the note was in the file, and that he would mail it to Jones that afternoon.

There was further evidence tending to show that on or about 22 November, 1929, Nelson had taken the original note of Jones for \$552 together with several other notes, and had them discounted at the Wachovia Bank and Trust Company and the proceeds credited to the corporation of which Nelson was an officer.

STATE V. NELSON.

The Lindsay Fishel Buick Company was closed about 1 December. The defendant Nelson admitted that the original Jones note was not returned to Jones and was discounted at the bank, but that same was done by mistake, and that when he had discovered the mistake he attempted to get the note back so as to return it to Jones, but had been unable to do so before his company failed.

The defendant offered about sixteen witnesses who testified that he was a man of good character. The record shows substantially the following with reference to the testimony of nine of said character witnesses:

1. Perry Hilts testified on direct examination as follows:

"I have known the defendant since 1920, and know his general reputation. It is good." This was all the testimony given by said witness."

(Question): "Please state to his Honor and the jury whether or not you—not Nelson—in the conduct of your business, when a man has given you a note for a deferred payment on an automobile and you took another note in lieu of it if you then discounted both of them for the one indebtedness?" (Answer): "No, sir."

(Question): "Have you ever done such a thing?" (Answer): "No, sir."

To the foregoing questions and answers the defendant objected. The objection was overruled and the defendant excepted.

The court instructed the jury as follows: "Gentlemen of the jury, the answer of the witness to the question will be considered by you as bearing upon this man's character and reputation, and has nothing to do with the defendant in this case."

2. Hoyle C. Ripple, witness for the defendant, testified as follows: "I am practicing law in Winston-Salem, and have known the defendant about eight years. His general character is good." This was all the testimony given by the witness on direct examination.

Cross-examination is as follows: (Question)—"Did you ever collect a debt of \$550 against any man twice, knowingly?"

Thereupon the court stated: "The answer of the witness may be considered by the jury as relating to the character and reputation of witness only."

(Answer): "No, sir, I have never been that good a collector, Mr. Graves."

(Question): "Do you mean to say you would ever do such a thing as that?" (Answer): "No, sir, I never said I would."

To the foregoing questions the defendant objected. The objection was overruled and the defendant excepted.

3. Guy Scott, a witness for defendant, testified as follows on direct examination:

STATE v. NELSON.

"I am a deputy sheriff of Forsyth County and have been for several years. I know the defendant and know his general character. It is good."

Cross-examination was as follows:

(Question)—"Will you please tell his Honor and the jury whether you have ever collected the amount of \$550 from a man twice, or got one note and discounted that and then got another note in lieu of that note, and discounted that one?" (Answer): "No, sir, I have not."

To the foregoing questions the defendant objected. The objection was overruled and the defendant excepted.

4. J. Erle McMichael testified on direct examination as follows: "I am clerk of the Superior Court of Forsyth County. I have known the defendant, James P. Nelson, since 1921. His general character is good."

This was all the testimony given by said witness on direct examination.

Cross-examination was as follows: "I never saw these two notes. I think one of them passed through my office." (Question): "Did you ever when you had a man's note for \$550 induce him to give you another note for \$550 and collect on both of them?" (Answer): "No, sir."

To the foregoing questions and answers the defendant objected. The objection was overruled and the defendant excepted.

5. T. C. Cough, witness for defendant, on direct examination testified as follows: "I am in the automobile business. I know the defendant. His general character is good."

The foregoing was all the testimony given by said witness on direct examination.

Cross-examination is as follows: (Question)—"Do you sell automobiles?" (Answer): "Yes, sir." (Question): "By the way, have you ever, since you were born or in the automobile business, sold an automobile and taken notes for deferred payments?" (Answer): "Yes, sir." (Question): "Did you ever induce a man, after he had executed one note, to give you another note for the same indebtedness and discount both of them?" (Answer): "No, sir, not as I know of."

To the foregoing questions the defendant objected. The objection was overruled and defendant excepted.

The examination of other witnesses was substantially similar to the foregoing.

There was a verdict of guilty, and the judgment of the court was that the defendant be confined in the State's prison for a term of three years, sentence to be suspended if the defendant should make good the note of R. R. Jones and pay to the school fund the sum of \$2,500, and the cost of this action.

From the foregoing judgment the defendant appealed.

STATE v. NELSON.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

John B. Slawter for defendant.

BROGDEN, J. The paramount question of law presented by the record is whether the cross-examination of character witnesses for defendant was within the law.

The court instructed the jury in two instances that the type of cross-examination pursued was competent only to discredit or impeach the witness himself. In other instances no instruction whatever was given. Cross-examination of a witness is not a matter of privilege or grace, but a matter of right, and is one of the most effective means known to the law for the ascertainment of truth and for testing the soundness or fallacy of the declarations of a witness. Hence for this reason cross-examination must of necessity cover a wide range, and consequently trial courts are justified in permitting wide latitude in subjecting witnesses to proper legal tests.

The decisions of this State have recognized and approved various methods of impeaching witnesses—notably (1) by proof of bad character; (2) proof of materially inconsistent and contradictory statements; (3) by disproving statements made in court by testimony of other witnesses; (4) by cross-examination tending to show (a) that the witness had been convicted of a crime although evidence of mere accusation of crime is incompetent; (b) bias or fallacy; (c) animus, feeling, kinship or mental capacity; (d) lack of veracity or memory. *S. v. O'Neale*, 26 N. C., 88; *S. v. Efler*, 85 N. C., 585; *Bank v. Pack*, 178 N. C., 388, 100 S. E., 615; *Rutledge v. Mfg. Co.*, 183 N. C., 430, 111 S. E., 774; *S. v. Jeffreys*, 192 N. C., 318, 135 S. E., 32; *Milling Co. v. Highway Commission*, 190 N. C., 692, 130 S. E., 724; *Nichols v. Bradshaw*, 195 N. C., 763, 143 S. E., 469; *S. v. Maslin*, 195 N. C., 537, 143 S. E., 3; *Clay v. Connor*, 198 N. C., 200; *S. v. Beal*, 199 N. C., 278.

The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case. It has been generally held that a character witness may be cross-examined with respect to the extent of his knowledge and acquaintance with the person in whose behalf he testifies or with regard to the sources of information upon which he bases his estimate of character. *S. v. Perkins*, 66 N. C., 126; *S. v. Austin*, 108 N. C., 780, 13 S. E., 219; *S. v. Killian*, 173 N. C., 792, 92 S. E., 499.

Applying the rules of law to the facts, it is clear that the questions propounded to the witness on cross-examination were not intended to disparage the witness, but rather to put before the jury the opinion of

HICKS v. GREENE COUNTY.

the witness upon the charges against the defendant laid in the indictment. In other words, the effect of the cross-examination is to ask the witness, "Would you have done what the defendant is charged in the bill of indictment for doing, or do you approve what the defendant is charged with doing?" In effect this is requiring the witness to express an opinion upon the merits or demerits of the charge laid against the defendant. Indirectly these questions tended to elicit the opinion of witness that the defendant would be a man of bad character if he had done the things alleged against him.

We find no law broad enough and liberal enough to sustain the cross-examination complained of in this case, and the defendant is entitled to a

New trial.

T. H. HICKS v. GREENE COUNTY.

(Filed 19 December, 1930.)

Controversy without Action B a—It is necessary to submission of controversy that the subject-matter could be basis for a civil suit.

The object or purpose of C. S., 626, is to determine upon a state of facts agreed by the parties, without the necessity of a formal action, questions in difference between them which might be the subject of a civil action, and where the questions arising upon the facts agreed to and submitted involve the validity of municipal bonds proposed to be issued, and the purchasers thereof are not made parties and will not be bound by the judgment, there is no matter involved that may be the subject-matter of a civil action, and an appeal from a judgment thereon of the Superior Court will be dismissed.

APPEAL by plaintiff from *Cowper, Special Judge*, at November Special Term, 1930, of GREENE. Proceeding dismissed.

The statement of facts agreed upon and submitted to the court, for its decision as to the questions of law involved, is as follows:

"1. That during the year 1921, the board of commissioners of the county of Greene sold and issued \$550,000 of road and bridge bonds dated 1 July, 1921, bearing interest at the rate of six per cent per annum, and all due and payable on 1 July, 1931.

2. That the board of commissioners of the county of Greene has placed in a sinking fund and now has in hand \$200,000 in government bonds and North Carolina State bonds, which will be used in paying \$200,000 of said \$550,000 bond issue.

3. That for the purpose of paying the remaining \$350,000 of said \$550,000 bond issue, after due advertisement according to law, and

HICKS v. GREENE COUNTY.

under and pursuant to the provisions of the County Finance Act of 1927, and especially under and pursuant to section 8-J of said act, on 15 October, A.D. 1930, the board of commissioners of the county of Greene, pursuant to resolutions adopted by it on 13 and 30 September, 1930, sold \$350,000 of serial five per cent bonds for the sum of \$335,670, to be dated 1 November, 1930, and delivered about 15 November, 1930. A copy of said resolution, together with a certified copy of the entire proceedings authorizing the issue of said bonds, is hereto attached, marked Exhibit A.

4. That the said \$350,000 bond issue and bond sale was, on 21 October, 1930, duly approved by the State Sinking Fund Commission by order and resolution, a copy of which is included in copy of entire proceedings authorizing the said issue of bonds hereto attached and marked Exhibit A.

5. That the General Assembly of North Carolina, at its regular session in the year 1927, enacted chapter 694 of its Public-Local Laws of the year 1927, which provided, 'That the board of county commissioners of Greene County, or other governing body of said county, shall not issue or sell any bonds of said county, or create any obligation of said county necessitating the issuance of bonds of said county, unless and until the same has been submitted to a vote of the qualified voters of said county and duly approved by a majority of the votes cast in such election: *Provided, however*, that the provisions of this act shall not apply to an issue of bonds of said county in case of fire or other casualty or unforeseen emergency necessitating an immediate issue of bonds in order that the affairs of the county can be carried on.'

6. That the purchasers of said bonds are ready, able and willing to accept and pay for the same, but will not do so until the validity of same has been approved by expert bond attorneys.

7. That upon the proceedings authorizing the issuance of said refunding bonds being submitted to bond attorneys for their approving opinion, the questions were raised: (a) as to whether chapter 694, Public-Local Laws of 1927, prohibited the board of commissioners of the county of Greene from issuing refunding bonds under the terms of the County Finance Act (chapter 81, Public Laws 1927), without a vote of the people; and (b) as to whether said refunding bonds would be issued for a special purpose as required by section 6 of Article V of the Constitution of North Carolina."

Upon the foregoing statement of facts agreed, the plaintiff and the board of commissioners of the county of Greene, desire an adjudication:

1. Is it necessary by reason of the provisions of said chapter 694, Public-Local Laws of 1927, to first submit the question of issuing the \$350,000 of bonds to a vote of the qualified voters of Greene County?

HICKS v. GREENE COUNTY.

2. Are the proposed bonds for a special purpose and to defray a necessary expense and can the board of commissioners lawfully issue and sell refunding bonds for the special purpose of paying valid bonded indebtedness incurred for necessary expenses evidenced by bonds due or to become due within one year from the time of the passage of the order authorizing same, the bonds to be paid in this case having been issued in the year 1921?

3. Will the \$350,000 of bonds referred to and described in agreed fact No. 3 herein, when issued and paid for, be a valid indebtedness of said Greene County?"

Upon the foregoing statement of facts agreed, the judgment of the Superior Court was as follows:

"This cause coming on to be heard at the November Special Term, 1930, of the Superior Court of Greene County, before the Honorable G. V. Cowper, judge presiding, and being heard upon the facts agreed upon and submitted to the court for decision in the above-entitled controversy without action;

Now, on motion, it is considered and adjudged by the court:

First. That the \$350,000 of refunding bonds referred to and described in agreed fact No. 3 herein, will, when issued and paid for, be a valid indebtedness of said Greene County.

Second. That said refunding bonds issued for the purpose set out in said agreed facts will be issued for a special purpose within the meaning of section 6 of Article V of the Constitution of North Carolina, and they will also be issued to defray a necessary expense of the county within the meaning of section 7 of Article VII of said Constitution, for which reasons it will not be necessary to submit the question as to the issue of said bonds to a vote of the people.

Third. It was not intended by the General Assembly in enacting chapter 694 of the Public-Local Laws of 1927, to prohibit the board of commissioners of the county of Greene from issuing refunding bonds under section 8-J of the County Finance Act (chapter 81, Public Laws of 1927) without a vote of the people, to pay valid bonded indebtedness of the county outstanding before the year 1927.

The plaintiff will pay the costs."

From the said judgment plaintiff appealed to the Supreme Court.

R. H. Taylor for plaintiff.

L. V. Morrill for defendants.

CONNOR, J. This appeal was submitted to this Court without oral argument, under Rule 10, 192 N. C., p. 844. It has been considered only on the record and on the printed briefs of counsel for both parties.

HICKS v. GREENE COUNTY.

It is apparent from a reading of the statement of facts agreed upon and submitted to the court below, and of the briefs filed in this Court, that there is no question in difference between the parties hereto, which might be the subject of a civil action for the determination of their respective rights on the facts agreed. C. S., 626. There is no real controversy between the parties, requiring a judgment of the Court to determine these rights. Both parties are asking for the same thing, to wit: that the questions propounded be answered by the Court relative to the validity of the bonds, which the board of commissioners of Greene County have issued and sold, and which the purchaser of said bonds has declined to accept and pay for on the advice of his attorney that the validity of the bonds is at least doubtful. The real controversy arising upon the facts agreed is not between the parties hereto, but between the board of commissioners of Greene County and the purchaser of the bonds.

Neither the answers to the questions propounded nor the judgment in accordance therewith will be binding on the purchaser of the bonds, who is not a party to this proceeding. Under the authority of *Burton v. Realty Co.*, 188 N. C., 473, 125 S. E., 3, this proceeding must be dismissed.

C. S., 626 confers no jurisdiction on the courts of this State to render an advisory opinion as to the law upon facts agreed. The purpose of the statute, as appears from its language and as uniformly construed by this Court, is to enable parties to a question in difference, which might be the subject of a civil action, where they agree as to the facts involved, to submit the facts to the Court, for its decision of the question in difference, and for its judgment in accordance therewith, without the expense and formalities required for a civil action. *Farthing v. Carrington*, 116 N. C., 315, 22 S. E., 9; *McKethan v. Ray*, 71 N. C., 165. Where, as in the instant case, the parties submit to the Court questions of law arising upon facts agreed, without showing that they have rights involved in the questions, upon which they would be entitled to judgment, in a civil action the Court is without jurisdiction, under C. S., 626, and should decline to consider the questions submitted for its decision.

Inasmuch as the principal question sought to be presented by this appeal for decision by this Court, involves the construction of chapter 694, Public-Local Laws of 1927, it may be noted that this statute was ratified on 9 March, 1927, and by its express terms has been in full force and effect since said date. It has not been amended, modified or repealed by any subsequent statute. It is therefore now in full force and effect.

The County Finance Act (chapter 81, Public Laws of 1927) was ratified on 7 March, 1927, and by its express terms has since been in

STATE v. ELLIS.

full force and effect. The bonds issued and sold by the board of commissioners of Greene County, under the provisions of this act are valid, unless the provisions of chapter 694, Public-Local Laws of 1927, are applicable to these bonds.

By the provisions of chapter 694, Public-Local Laws of 1927, the board of commissioners of Greene County are forbidden to issue any bonds of said county, without the approval first obtained of a majority of the qualified voters of said county, with certain exceptions which do not include bonds for refunding bonds issued and outstanding at the date of its ratification. It would seem that the statute is applicable to refunding bonds, and that such bonds are not valid, unless their issuance has been approved as required by the statute. We find nothing in the language of the statute which shows a contrary intention of the General Assembly.

For the reasons stated in this opinion the proceeding is
Dismissed.

STATE v. JOHN ELLIS, TED HONEYCUTT, MARY FRICK AND
MABEL YARBOROUGH.

(Filed 19 December, 1930.)

1. Criminal Law J b—On trial for felony not a capital offense the trial court may withdraw a juror and order mistrial in his discretion.

Where the defendants are indicted for the criminal offense, robbery and conspiracy to rob, it is within the discretion of the trial judge to withdraw a juror and order a mistrial.

2. Criminal Law F a—Where mistrial is ordered without objection plea of former jeopardy after second jury is empaneled in too late.

Where the trial judge has in the exercise of his sound discretion withdrawn a juror and ordered a mistrial in a criminal action, charging robbery and conspiracy, after allowing the motion of the solicitor to cure an error in the indictment by giving the true name of a defendant, this defendant is not placed in jeopardy a second time for the same offense when she has made the appropriate motion without having excepted to the order of mistrial before the jury had been empaneled to try the action under the second or corrected indictment, and her motion is properly disallowed.

3. Criminal Law L d—The record imports verity.

The record on appeal will control as to whether the proper exception had been duly taken on the question of the plea of former jeopardy relied on in this case.

STACY, C. J., dissenting; BROGDEN, J., concurring in dissenting opinion.

STATE v. ELLIS.

APPEAL by Mary Frick from *Clement, J.*, and a jury, at September Term, 1930, of ROWAN. No error.

The defendants were indicted on a bill of indictment containing two counts: (1) robbery and (2) conspiracy to rob with charge of aiding, etc., to rob the Bank of Rockwell of \$1,126.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Walter H. Woodson and P. S. Carlton for defendant, Mary Frick.

CLARKSON, J. The only question presented upon this appeal is whether or not, the jeopardy having attached under the first bill, the defendant, Mary Frick, is entitled to her discharge on the ground of former jeopardy on the second bill. We think not, under the facts and circumstances of this case.

When all four defendants were called upon to plead under the first bill of indictment, Ellis and Honeycutt pleaded guilty. Mary Frick and Mabel Yarborough pleaded not guilty. A jury was selected and empaneled. After the solicitor read the bill it appeared that in one portion of the bill it was incorrect. In the second count the name of "Mable Yarbourough" appeared "Mabel Honeycutt." Thereupon Mabel Yarborough moved to quash the second count of the bill of indictment for the reason that her name was incorrectly stated. The court quashed the bill of indictment as to her and the solicitor was allotted time to draw a new bill. A new bill was drawn and sent to the grand jury and returned "A true bill as to all four defendants." The court thereupon withdrew a juror and ordered a mistrial as to the first bill of indictment.

The defendants were then required to plead to the second or new bill of indictment and the defendants, John Ellis and Ted Honeycutt, pleaded "Guilty" as charged in the bill of indictment and the defendants, Mary Frick and Mabel Yarborough, pleaded "Not Guilty."

A jury was then selected by the State and passed upon, but before being empaneled the defendant, Mary Frick, and after she had pleaded to the first bill of indictment, made the following motion: (By the court: After the defendant, Mary Frick, had pleaded to the first bill of indictment, the defendant, Mary Frick, when called upon by the solicitor to plead to the second bill of indictment, set out above, made the following motion): "The defendant, Mary Frick, herewith files a plea in abatement and moves the court that she be discharged and that the case against her be dismissed for that after the case against her had been called and the jury had been sworn and empaneled, upon motion of Mabel Yarborough, the court quashed the bill of indictment against the defendant, Mabel Yarborough, and now to place the defendant, Mary

STATE v. ELLIS.

Frick, upon trial on a new bill of indictment charging her with the same offense, would be to place her in double jeopardy in violation of her constitutional rights guaranteed her under the Constitution of North Carolina and the Constitution of the United States."

The case on appeal to this Court was agreed upon as shown by the record that "the court thereupon withdrew a juror and ordered a mistrial as to the first bill of indictment." Nowhere in the record does it appear that defendant, Mary Frick, made any objection or exception to the court below withdrawing a juror and ordering a mistrial on the first bill of indictment. Defendant in her brief says, "This order was without the consent of the defendant, Mary Frick, and was over her objection." The record does not so show.

In *Furniture Co. v. Clark*, 191 N. C., at p. 371, "In the defendant's brief reference is made to matters which do not appear in the case on appeal, but we are bound by the record." The record imports verity. *Story v. Truitt*, 193 N. C., 851; *Cogdill v. Hardwood Co.*, 194 N. C., at p. 747.

In *S. v. England*, 78 N. C., at p. 553, we find: "The principle is admitted that no person shall be subject for the same offense to be twice put in jeopardy of life and limb, and upon the same principle no man shall be placed in peril of any legal penalties more than once upon the same accusation for any criminal offense whatever. *But there is no jeopardy and no peril where the indictment upon which he has been charged is defective.* 4 Coke, 44; Whar. Cr. Law, sec. 587, 588 (italics ours). The prisoner in our case was put upon his trial, and the jury empaneled and charged with his case, when upon the suggestion of the prosecuting officer that the indictment was defective, a juror was withdrawn by direction of the court and a mistrial had, and the prisoner was afterwards tried and convicted upon another indictment for the same offense. If, therefore, the first indictment was so defective that no judgment could have been pronounced upon the prisoner in case of his conviction, it was proper to put him upon his trial upon another and sufficient indictment. We think the first indictment was insufficient." *S. v. Drakeford*, 162 N. C., 667. The misnomer in the present case was of the surname, "Mabel Honeycutt" instead of "Mabel Yarborough."

In 8 R. C. L., part sec. 80, p. 114, is the following: "Modern decisions make no distinction between misnomers of the surname and of the Christian name. In either case, if it is substantial, it is good cause for an abatement of the proceedings."

The defendants were not tried for a capital offense. We think *S. v. Upton*, 170 N. C., 769, analogous to the present case. We find at p. 770: "The defendant made no exception when the juror was withdrawn

STATE v. ELLIS.

and made his exception only when the new jury was empaneled. (Italics ours.) . . . The trial was for a felony, not capital, and it was discretionary with the judge to order a mistrial. *S. v. Collins*, 115 N. C., 716, citing *S. v. Johnson*, 75 N. C., 123, where *Pearson, C. J.*, said that if on the trial for a capital offense the judge directs a mistrial, he is required to find the facts, and his action is subject to a review on appeal; but that on trial for a felony not capital, or for a lesser offense, the discretion of the presiding judge in making a mistrial is not subject to review, for he has the discretion to do so whenever he believes it proper in furtherance of justice, citing *S. v. Weaver*, 35 N. C., 203; *Brady v. Beason*, 28 N. C., 425. Even if this had been a trial for capital felony, it would not have been error for the court to have made a mistrial 'when necessary to attain the ends of justice.' *S. v. Guthrie*, 145 N. C., 495; *S. v. Tyson*, 138 N. C., 627, which is cited in *S. v. Dry*, 152 N. C., 813." *S. v. Cain*, 175 N. C., 825; *S. v. Beal*, 199 N. C., at pp. 294-5-6.

All four of the defendants were jointly indicted. The jury was selected and empaneled. Both Mabel Yarborough and Mary Frick pleaded "not guilty." It was discovered that in the second count of the first bill of indictment the name of "Mable Honeycutt" appeared when it should have been "Mable Yarborough." After a new bill was returned by the grand jury as to all four of the defendants, the court below withdrew a juror and ordered a mistrial as to the first bill of indictment. When this was done, Mary Frick made no objection or exception. Speaking to the subject, we find in 8 R. C. L. (Criminal Law), p. 113, the following: "Where a defendant desires to take advantage of irregularities occurring before arraignment he should specially plead them in abatement of the proceeding. Defects in the indictment are thus to be taken advantage of, as, for instance, that it is not signed by the foreman of the grand jury. This plea is proper in the case of irregularities not apparent of record as well as in those that are so apparent, and it is sometimes provided by statute that when extrinsic facts are relied on they must be supported by proof of the truth thereof by affidavit or other evidence. As to the time of pleading, such a plea must always precede the plea of not guilty, because a plea of not guilty waives all precedent irregularities." The plea of former jeopardy, or conviction, may be entertained and determined before the same jury now under the plea of "not guilty" by consent. *S. v. Cale*, 150 N. C., 805. But the court below had discretion in the matter "whenever he believes it proper in furtherance of justice." The first bill was defective and the court below was within its discretion in allowing the solicitor's motion. Defendant was not tried on the first bill and there is nothing in the record to show that she did not get a fair and impartial trial on the second bill. From the facts disclosed on the present record,

STATE v. ELLIS.

we think the court below had the discretion to withdraw a juror and order a mistrial, and if defendant had any rights she should have excepted and asserted them at that time. Under the facts and circumstances of this case, it is too late for her now to complain.

Defendant in her brief says, "The bill contains two counts not of the same grade and the punishment not the same. The jury returned a general verdict of guilty. This is error and entitles the prisoner to a new trial. *S. v. Johnson*, 75 N. C., 123." Public Laws of North Carolina, session 1929, ch. 187, we think from its language is sufficient to sustain the general verdict of guilty. Therefore, *S. v. Johnson*, *supra*, is not applicable. In the judgment below there is

No error.

STACY, C. J., dissenting: It is held with us that pleas of former jeopardy and not guilty may be entered at the same time and tried before the same jury. *S. v. Cale*, 150 N. C., 805, 63 S. E., 958; *S. v. White*, 146 N. C., 608, 60 S. E., 505; *S. v. Taylor*, 133 N. C., 755, 46 S. E., 5; *S. v. Winchester*, 113 N. C., 641, 18 S. E., 657; *S. v. Pollard*, 83 N. C., 597, 8 R. C. L., 119. Hence, the confusion in the record relative to the time and manner in which the defendant entered her pleas is not regarded as fatal to her case. *S. v. Washington*, 89 N. C., 535.

The first bill of indictment was quashed in part only at the instance of Mabel Yarborough, and not on motion of Mary Frick. Therefore, the decision in *S. v. Drakeford*, 162 N. C., 667, 78 S. E., 308, while apparently applicable to the former, would seem to be inapplicable to the latter.

The right of the court to discharge a jury and order a mistrial in any case, for cause, is not questioned by the appellant. *S. v. Beal*, 199 N. C., 278. The gravamen of her complaint is that, after jeopardy had attached under the first bill of indictment (*S. v. Smith*, 170 N. C., 742, 87 S. E., 98) and the jury discharged without cause as to her (*S. v. Davis*, 80 N. C., 384), she was subsequently put on trial on another bill charging the same offense. *S. v. Prince*, 63 N. C., 529.

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case. 16 C. J., 236-237.

It would seem that the appealing defendant is entitled to a hearing on her plea of former jeopardy. *S. v. Ellsworth*, 131 N. C., 773, 42 S. E., 699.

BROGDEN, J., concurs in dissent.

WAGNER v. CONOVER.

MRS. F. S. WAGNER v. THE TOWN OF CONOVER.

(Filed 19 December, 1930.)

- 1. Municipal Corporations E f—A city is liable in damages for injuries to lands caused by its sewer system.**

An incorporated town is liable in damages to the lands of a lower proprietor on a stream for the disposal of sewage into the waters of a stream causing depreciation in the value of the land of the lower proprietor upon the principle that it amounts to a taking of private property for a public use to the extent of the damage, requiring compensation to be paid under the provisions of our Constitution.

- 2. Same—Where permanent damages are caused by sewer system an issue thereon may be requested by either party—Measure of damage.**

Where the injury to the plaintiff's land is shown to be of a permanent nature and caused by the sewerage disposal plant of the defendant incorporated town, permanent damages may be awarded by the jury, measured by the difference in value of the land before and after the time the sewer system was constructed and maintained.

- 3. Same—City may not escape liability for damage caused by sewer system on ground that its maintenance was a governmental function.**

A municipality may not escape liability for damages to the land of a lower proprietor caused by its maintenance of a sewerage disposal plant upon the ground that it was done in the exercise of a governmental function.

- 4. Same—Noxious gases may be considered by the jury as an element of damage caused by city's sewer system.**

Noxious gases affecting the health of those living upon the land may be considered by the jury in assessing damages to the plaintiff's land caused by the defendant municipality's sewerage disposal plant as an element causing depreciation to the value of the land.

- 5. Same—Instruction on question of measure of damages recoverable for injury to land by sewer system held not erroneous.**

Where there is evidence tending to show that the plaintiff's land was diminished in value by a municipality disposing of its sewage in a stream above the land, no error will be found in the instruction of the court confining the injury to that done to the plaintiff's land when, considering the charge as a whole, the jury must have awarded damages for the injury to the land in exclusion of any separate damages to the health of the plaintiff or those living upon the land.

- 6. Same—Measure of permanent damages caused by sewer system of city.**

Where prospective damages are awarded against a municipality for maintaining and operating a sewerage disposal plant to the damage of plaintiff's land lying lower down upon a stream into which the sewage was emptied, in assessing plaintiff's prospective damages the judgment should include such future damages as will result to the land from the lawful maintenance of the sewerage plant that had been constructed.

WAGNER v. CONOVER.

APPEAL by defendant from *Stack, J.*, and a jury, at January Term, 1930, of CATAWBA. Modified and affirmed.

This was a civil action instituted by the plaintiff to recover of the defendant for the alleged construction and maintenance of a sewer disposal into the waters of a stream which ultimately ran down to, upon, and over the land of the plaintiff.

The issues submitted to the jury and their answers thereto were as follows:

"1. Is the plaintiff the owner of the lands described in her complaint? Answer: Yes.

2. Has the plaintiff's lands been damaged by the installation and maintenance of the defendant's sewer system, as alleged in her complaint? Answer: Yes.

3. If so, what permanent damages, if any, is plaintiff entitled to recover? Answer: \$2,000."

The judgment was as follows: "This cause coming on to be heard before his Honor, A. M. Stack, judge, and a jury, at January Term, 1930, and the jury having answered the issues in favor of the plaintiff, and assessed her damages at \$2,000, and the court having intimated that \$1,750 would be a fair value for the damages sustained to the plaintiff's land, adjudged and ordered that the plaintiff recover of the defendant the sum of \$1,750, and the costs of action by way of permanent damages to her lands by reason of the acts of the defendant as complained of in her complaint, and for costs of action. The reduction of the recovery from \$2,000 to \$1,750 is with the plaintiff's consent."

Defendant made numerous assignments of error and appealed to the Supreme Court.

M. H. Yount for plaintiff.

Wilson Warlick for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. In overruling these motions in the court below, we can see no error.

It is well settled in this jurisdiction that plaintiff can recover of a municipality for sewer disposal causing damage. In *Donnell v. Greensboro*, 164 N. C., at p. 334, citing numerous authorities, is the following: "The decisions of this State are in approval of the principle that the owner can recover such damage for a wrong of this character, and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions or by express municipal or legislative authority, the position being that the damage arising from the impaired value of the property is to be considered and dealt with to

WAGNER v. CONOVER.

that extent as a 'taking or appropriation,' and brings the claim within the constitutional principle that a man's property may not be taken from him even for the public benefit except upon compensation duly made." *Sandlin v. Wilmington*, 185 N. C., 257; *Cook v. Mebane*, 191 N. C., 1; *Moses v. Morganton*, 192 N. C., 102, and 195 N. C., 92.

The evidence is competent in regard to a spring in the bank of the creek gone after the construction and maintenance of the sewer disposal into the stream and also the use of the land for a swimming pool, the probative force is for the jury. *Ayden v. Lancaster*, 197 N. C., at p. 560-1.

The court below charged: "If one by the maintenance of a manufacturing plant, sewerage flow or anything of that kind, injuriously affects the health, the life or the property of another, thereby injuring such person in the enjoyment of their rights, then that would give the action to the one who owns the property." The defendant excepted and assigned error to the above portion of the charge made by the court below.

In *Moser v. Burlington*, 162 N. C., at p. 144, we find: "On the question of damages, his Honor correctly applied the rule as it obtains with us, that the damages are confined to the diminished pecuniary value of the property incident to the wrong. *Metz v. City of Asheville*, 150 N. C., 748; *Williams v. Greenville*, 130 N. C., 93, the evidence as to specific cases of sickness in plaintiff's family having been admitted and its consideration allowed only as it tended to establish the existence of the nuisance and the amount of damage done to the property."

In *Donnell v. Greensboro*, *supra*, at p. 335, speaking to the subject: "In such case, and except as affected by the existence of certain rights peculiar to riparian ownership, a recovery does not seem to depend on whether the damage is caused through the medium of polluted water or noxious air; the injury is considered a taking or appropriation of the property to that extent, and compensation may be awarded. *Brown v. Chemical Co.*, 162 N. C., 83."

The present action is against the municipality—one brought to recover damage for injury done to the property. The question of health or noxious air is applicable only so far as it affects the taking or appropriation of the property. The charge being general is subject to criticism, but we cannot hold it as prejudicial error, as there was no evidence or contention as to injury to health.

The court below charged: ("Permanent damages means the damage that has already been incurred, or that may be incurred in the future, because the plaintiff asks for permanent damages. If you award any damages at all, that is for the future as well as for the past, and would give this defendant an easement to empty its sewerage into that stream and to stay where it is now—give it a right to continue it without fur-

WAGNER v. CONOVER.

ther litigation.") The court also charged: "Permanent damage means whatever injury has been done to the place and will be done—that is, damages to its value. In other words, how much, if any, had this sewer system there damaged the place, and the way to get at the amount of damage, if you reach that is this: You will ascertain what the place would be worth if the sewer system was not there, and no pollution of the water by the defendant. Set that down in figures. Then ascertain what would be the market value of the land in its present condition—and set that down, and if that is less than the amount if the sewerage were not there, then subtract the one from the other, and that would be your answer to the third issue, if you reach that issue."

We cannot sustain defendant's exception and assignment of error to the above portions of the charge in brackets. The charge, taken as a whole we do not think is such reversible error as the charge was held to be in *Moser v. Burlington*, 162 N. C., at p. 144. There was no evidence in the present case of the existence of an indictable public nuisance and the charge in the *Moser case* was susceptible that damage was awarded also for the public nuisance.

In *Rhodes v. Durham*, 165 N. C., at p. 680, citing numerous authorities, is the following: "Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such an exigent nature that right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement."

The present case was tried out on the theory of permanent damage, which was a right of plaintiff and also defendant, it being a municipality with the right to condemn an easement for sewerage disposal.

In cases of private ownership, an issue for permanent damages may be sustained by consent of parties. *Langley v. Hosiery Mills*, 194 N. C., at p. 646. Of course where the "structures or conditions permanent in their nature," as in the present case, plaintiff and defendant (being a municipality) both had the right to have an issue submitted for permanent damage. *Rhodes v. Durham*, *supra*.

The charge clearly and specifically relates to permanent damage, and the jury, from the charge of the court below, necessarily found that the amount rendered was for permanent damage "done to the place and will be done." The judgment should be modified to include damage that "will be done" from its lawful maintenance and operation. The judgment below is

Modified and affirmed.

CLARK *v.* HENDERSON.

R. H. CLARK ET AL. *v.* SAPHRONIA HENDERSON ET AL.

(Filed 19 December, 1930.)

Appeal and Error F a—In order for matter to be considered on appeal it must be presented by assignment of error.

Matter discussed in appellant's brief must be presented by assignment of error to be considered on appeal.

APPEAL by plaintiffs from *MacRae, Special Judge*, presiding at March Term, 1930, of MADISON. No error.

This is an action to recover possession of land upon the allegation in the complaint that plaintiffs are the owners and entitled to the possession of the land described therein. This allegation is denied by defendants in their answer.

The first issue submitted to the jury was answered as follows:

"1. Are the plaintiffs the owners and entitled to the possession of the land described in the complaint? Answer: No."

From judgment on the verdict that plaintiffs are not the owners, and are not entitled to recover possession of the land described in the complaint, plaintiffs appealed to the Supreme Court.

J. Coleman Ramsay and John H. McElroy for plaintiffs.

John A. Hendricks and Guy V. Roberts for defendants.

PER CURIAM. The only assignment of error set out in the transcript filed in this Court on plaintiffs' appeal, is based on their exception to the judgment. There is no error in the judgment. It is supported by the verdict.

The contention of plaintiffs that there was error in the instruction of the court to the jury with respect to the first issue, although discussed in the brief filed for plaintiffs in this Court, cannot be considered for the reason that this contention is not presented by an assignment of error made as required by the rules of this Court. See Rules of Practice in the Supreme Court, 192 N. C., 839. Rule 19, sec. 3.

No error.

STATE v. FAIN.

STATE v. BOSE FAIN.

(Filed 19 December, 1930.)

Criminal Law G m—Evidence in this case held insufficient to sustain conviction.

Evidence only that defendant was on friendly terms with a young woman in whose possession stolen property was found is insufficient to convict him of housebreaking, larceny, or receiving stolen goods of which he is charged in the bill of indictment, and nonsuit should have been entered.

APPEAL by defendant from *Harwood, Special Judge*, at April Term, 1930, of CHEROKEE. Reversed.

This is a criminal action in which defendant was tried on an indictment charging housebreaking, larceny and receiving stolen goods, knowing them to have been stolen. There was a verdict of guilty.

From judgment that defendant be confined in the State's prison for a term of not less than twelve nor more than fifteen months, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Moody & Moody for defendant.

PER CURIAM. The evidence for the State at the trial of this action tended to show that defendant was seen in the company of a young woman who had in her possession articles of personal property, which had been stolen. There was no evidence tending to show that defendant had had said property in his possession or that he had given the same to his companion. Evidence tending to show friendly relations between the defendant and the woman, in whose possession the articles were found, was not sufficient to show that defendant broke and entered the store from which the property was stolen, that he had stolen the property or had received the same, knowing it to have been stolen. There was error in the refusal of defendant's motion for judgment as of nonsuit, at the close of the evidence for the State. For this reason the judgment must be

Reversed.

GARDNER *v.* MOOSE; PARSONS *v.* BOARD OF EDUCATION.

O. R. GARDNER *v.* A. L. MOOSE.

(Filed 19 December, 1930.)

Appeal and Error E a—Where the summons and complaint do not appear in the record the appeal will be dismissed.

Case dismissed on appeal for failure to observe Rule 19(1) governing appeals, the nature of the action not appearing from the record.

CIVIL ACTION, before *Oglesby, J.*, at March Special Term, 1930, of CABARRUS.

Case dismissed on appeal for failure to observe Rule 19 (1) governing appeals, the nature of the action not appearing in record.

This action was begun in a court of a justice of the peace presumably to recover for property damage in an automobile collision. There was judgment for the plaintiff. Apparently, defendant set up a counter-claim and issues submitted thereon were answered in the negative.

From judgment for the plaintiff the defendant appealed.

No counsel for plaintiff.

H. S. Williams for defendant.

PER CURIAM. The summons and complaint do not appear in the record. Hence we are not properly informed as to the nature of the action. Therefore, in accordance with Rule 19, section 1, the appeal is dismissed. *Waters v. Waters*, 199 N. C., 667; *Pruitt v. Wood*, 199 N. C., 788.

Appeal dismissed.

MRS. LLOYD V. PARSONS, WIDOW OF LLOYD V. PARSONS, *v.* BOARD OF EDUCATION OF ASHE COUNTY.

(Filed 19 December, 1930.)

Appeal and Error J d—Where Supreme Court is divided the judgment of the lower court will be affirmed.

Upon division of opinion of the Justices on appeal, one Justice not sitting, the judgment of the lower court will be affirmed, in this case without becoming a precedent.

APPEAL by respondent from *Finley, J.*, at August Term, 1930, of ASHE. Affirmed.

This was an appeal from the North Carolina Industrial Commission, heard on exceptions to an award made by said Commission in favor of

HELMS v. COLLINS.

claimant, widow of Lloyd V. Parsons, deceased, and against the respondent, the board of education of Ashe County. The exceptions were overruled.

From judgment affirming the award of the Commission, respondent appealed to the Supreme Court.

W. R. Bauguess for claimant.

T. C. Bowie for respondent.

Attorney-General for Industrial Commission.

PER CURIAM. The Court being evenly divided in opinion, *Stacy, C. J.*, not sitting, the judgment of the Superior Court is affirmed and stands as the decision of this case, without becoming a precedent. *Gooch v. Western Union Telegraph Co.*, 196 N. C., 823, 146 S. E., 803, and cases cited.

Affirmed.

ETTA HELMS AND FRANK HELMS, HER HUSBAND, v. E. A. COLLINS.

(Filed 19 December, 1930.)

Wills E c—Devisee took fee simple under rule in Shelley's case after falling in of prior life estate under terms of this will.

A devise to testator's wife of all his real property with power of disposition over all or a part of the same, and the part not so disposed of to his daughter for her life and at her death to the "heirs of her body": *Held*, upon the death of the wife without any disposition of the property the title to the lands vests in the daughter in fee simple under the rule in *Shelley's case*, the naked power of disposition to the wife not affecting the result.

APPEAL by defendant from *McElroy, J.*, at August Term, 1930, of UNION. Affirmed.

On 15 November, 1929, the plaintiffs and the defendant entered into a written contract for sale by the plaintiffs and purchase by the defendant of three tracts of land at the agreed price of \$3,400. The plaintiffs tendered and the defendant declined to accept a deed for the land on the ground that the *feme* plaintiff owns a life estate and not a fee simple.

The parties agreed on the facts, and the trial court adjudged that Etta Helms is the owner in fee and that the defendant should accept the deed at the price agreed.

W. B. Love and W. H. Rooker for plaintiffs.

Gilliam Craig for defendant.

STATE v. BEAL.

PER CURIAM. J. W. Clontz made a will containing the following item: "I give, devise and bequeath unto my wife, E. Jane Clontz, all of my real and personal property of every description and wheresoever located so long as she may live, and should she need the proceeds of the same to live on I give her the right to sell a part or all of the same, but that part not sold or used by her during her lifetime I give and devise unto my daughter Louetta Helms for and during her life and at her death to the heirs of her body."

Jane Clontz did not sell any part of the land devised to her for life. The naked gift of a power of disposition did not convert her life estate into a fee. *Carroll v. Herring*, 180 N. C., 369; *Roane v. Robinson*, 189 N. C., 628. The remainder "to my daughter Louetta Helms for and during her life and at her death to the heirs of her body" vests in Louetta Helms an estate in fee under the rule in *Shelley's case*. *Chamblee v. Broughton*, 120 N. C., 171; *Bank v. Dortch*, 186 N. C., 510.

Judgment affirmed.

STATE v. CHARLEY BEAL ET AL.

(Filed 19 December, 1930.)

Receiving Stolen Goods D c—A verdict failing to find that defendant knew goods to be stolen at time of receiving is defective.

Where the defendants are tried for storebreaking, larceny and receiving stolen property, and a verdict of guilty on the last count is rendered without a finding that the defendants knew the goods to be stolen at the time of receiving them, the verdict is fatally defective, and the defendants' motions, aptly made, to set aside the verdict or in arrest of judgment should be allowed, and a *venire de novo* will be ordered on appeal when the motions have been denied.

APPEAL by defendants from *Finley, J.*, at March-April Term, 1930, of CHEROKEE. *Venire de novo*.

This is a criminal action in which defendants were tried on an indictment for storebreaking, larceny and receiving stolen goods, knowing same to have been stolen.

The verdict returned by the jury as shown by the record was as follows: "All of the defendants guilty on the third count, of having these goods in their possession, knowing them to have been stolen. Not guilty as to breaking and entering, and for larceny." From judgment on the verdict, defendants appealed to the Supreme Court.

GARRIS v. HARDY.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Dillard & Hill and Moody & Moody for defendants.

PER CURIAM. After the return of the verdict as shown by the record, defendants and each of them moved that the same be set aside. This motion was overruled and defendants excepted. Defendants then moved in arrest of judgment. This motion was overruled and defendants again excepted. Their assignments of error based on these exceptions must be sustained. *S. v. Barbee*, 197 N. C., 248, 148 S. E., 249, and cases there cited.

On the record the defendants are entitled to a *venire de novo*. It is so ordered.

Venire de novo.

P. F. GARRIS AND E. B. GARRIS, ADMINISTRATORS OF GEORGE W.
GARRIS, v. W. P. HARDY.

(Filed 19 December, 1930.)

Controversy without Action A b—Appeal from judgment in controversy without action will be dismissed when affidavit has not been filed.

An appeal from a judgment in a controversy without action on an agreed statement of facts when the necessary affidavit has not been filed will be dismissed.

APPEAL by defendant from *Devin, J.*, 3 November, 1930. From LENOIR.

Controversy without action, submitted on agreed statement of facts but unaccompanied by jurisdictional affidavit.

Judgment for plaintiff. Defendant appeals.

J. Faison Thomson for plaintiffs.

N. W. Outlaw for defendant.

PER CURIAM. Dismissed for failure to accompany agreed statement of facts with necessary affidavit. *Grandy v. Gulley*, 120 N. C., 176, 26 S. E., 779; *Pruitt v. Wood*, 199 N. C., 788.

Dismissed.

LIPE v. COUNTY OF STANLY; MURPHY v. COACH CO.

I. W. LIPE v. COUNTY OF STANLY.

(Filed 19 December, 1930.)

Controversy without Action A b: Appeal and Error E a—Affidavit must be filed in submission of controversy: Record must contain necessary parts.

A case submitted on agreed statement of facts must be accompanied by necessary affidavit, and if an adversary proceeding the record proper must contain necessary parts, otherwise the appeal will be dismissed.

APPEAL by defendant from *Johnson*, *Special Judge*, at July Term, 1930, of STANLY.

Proceeding to determine the liability of the defendant under C. S., 8035, "for costs and attorney's fees" where unidentified and undiscoverable lands are sold for taxes.

From a judgment for the plaintiff, rendered on an agreed statement of facts, the defendant appeals.

W. L. Mann for plaintiff.

W. E. Bogle for defendant.

PER CURIAM. It is not clear from the record whether this is a controversy without action, submitted on an agreed statement of facts, or an adversary proceeding in which the facts were agreed upon. If the former, it must be dismissed for failure to accompany the agreed statement of facts with necessary affidavit. *Grandy v. Gulley*, 120 N. C., 176, 26 S. E., 779. If the latter, the pleadings are not before us and the appeal must be dismissed for failure to send up necessary parts of the record proper. *Waters v. Waters*, 199 N. C., 667; *Pruitt v. Wood*, 199 N. C., 788.

Dismissed.

F. HUGHES MURPHY v. ASHEVILLE-KNOXVILLE COACH COMPANY, INCORPORATED, AND J. H. POSTON.

(Filed 27 January, 1931.)

1. Highways B j—Evidence of negligence and contributory negligence held properly submitted to the jury in this case.

In an action to recover damages for the alleged negligence of the defendant driving a passenger bus upon a public highway in stopping, or nearly so, and not heeding plaintiff's signal to pass, forcing the plaintiff in so doing onto a side of the road near a bridge across a stream, so that to avoid the stream the plaintiff was forced upon the bridge

MURPHY v. COACH CO.

running along side of the defendant's bus, which by its negligent driving forced the plaintiff's car through the railing of the bridge into the stream causing the injury complained of, with evidence to the contrary that it was the negligence of the plaintiff in not observing the rules of the road that caused said injury, *Held*: the issues were raised for the determination of the jury as to the defendant's negligence, or the plaintiff's contributory negligence as the proximate cause of the injury, and defendant's motion as of nonsuit made under the provisions of the statute was properly denied. C. S., 567.

2. Negligence C d—The burden of proving contributory negligence is on the defendant.

The burden of showing contributory negligence is on the defendant when relied on by him, and where the evidence is insufficient to establish contributory negligence barring recovery as a matter of law the defendant's motion as of nonsuit will be denied.

3. Highways B a—Failure to give or observe signal for passing car going in same direction is negligence.

The failure to give or observe the signals required by the statute to be given upon the highway by drivers of automobiles desiring to pass other automobiles going in the same direction upon the highway and other requirements for the safety of travel thereon is negligence, and actionable when the proximate cause of injury.

4. Highways B d—Failure to give statutory signals when stopping or turning off highway is negligence.

One driving an automobile upon a public highway is required by the common law to use care for the safety of pedestrians and the other drivers of automobiles and vehicles thereon, and by provision of statute to give specific signals before stopping or turning thereon, Michie Code, 2631(59) (a), and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury damages may be recovered therefor by the one injured.

5. Same—Failure to give statutory signal for stopping is actionable negligence when the proximate cause of injury.

The driver of an automobile upon the public highways of the State, before starting or stopping or turning from a direct line is required to first see that such movement can be safely made, and give the statutory signals clearly visible to those who may be affected thereby, and when a driver of an automobile fails to observe these statutory regulations in coming to a near stop and such failure is the proximate cause of an injury to another endeavoring to pass, it constitutes actionable negligence.

6. Negligence C a—Contributory negligence is the failure of the plaintiff to exercise care of ordinarily prudent man under the circumstances.

In an action to recover damages against defendant for its driver's negligence in driving its bus upon the State highway, and the plaintiff's contributory negligence is pleaded in bar of recovery, the test of the defense is whether the plaintiff failed to exercise that degree of care that an ordinarily prudent man would have observed under similar circumstances, and if such failure was the proximate cause of the injury in suit, the burden of proof being on the defendant.

MURPHY v. COACH Co.

7. Highways B d—Swerving bus to one side is not negligence when made necessary for protection of passengers by negligence of plaintiff.

Where there is evidence tending to show that the defendant's auto-truck was forced to attempt to cross a bridge over a highway with defendant's passenger bus going in the same direction and that in so doing the plaintiff's truck struck the defendant's bus, *Held*: under the facts of this case an instruction was correct that the defendant's driver of the bus would not be negligent in swerving the bus to one side if such were necessary for his protection and the protection of his passengers.

8. Highways B b—Duty of driver passing intersection of State highways.

Where the driver of a motor vehicle in going to his destination must cross a public highway at its intersection with another road, it is required of him that he may cross over with due regard to the safety of others using the highway.

9. Appeal and Error J c—Error, if any, in instructions in this case held harmless.

Under the evidence in this case *Held*: a question asked the court by the jury which had received the case, and pending their deliberation, if they should consider an intersecting highway the center of the road leading the other way, *Held*: the reply of the court that it was for them to determine under the facts and circumstances of the case, if error, was not prejudicial or reversible.

10. Trial E g—Where charge is correct when construed as a whole it will not be held for error.

When the charge of the judge to the jury is correct when considered as a whole it will not be held for reversible error if certain matters therein, taken disjointedly therefrom, may not be technically correct.

APPEAL by defendants from *Oglesby, J.*, and a jury, at July Term, 1930, of BUNCOMBE. No error.

This is an action for actionable negligence brought by plaintiff against defendants for injuries sustained on or about 19 April, 1929. The plaintiff was the driver and operator of a truck for one L. H. Hudson. The defendant Asheville-Knoxville Coach Company was engaged in the business of a common carrier and ran a bus line. The defendant J. H. Poston was the driver and operator of the bus that collided with plaintiff's truck, which it is alleged caused the injury to plaintiff, for which this action is instituted.

The plaintiff alleges, in part: That the said defendant, J. H. Poston, while operating the coach, a very large motor bus, belonging to his co-defendant, Asheville-Knoxville Coach Company, Inc., was proceeding in a westerly direction upon State Highway No. 20, and after proceeding for some distance just in front of the truck which was being operated by the plaintiff, the said defendant, with full knowledge that the truck of the said plaintiff was proceeding upon said highway No. 20, in the same direction as that upon which he, the said defendant, was proceeding,

MURPHY v. COACH CO.

recklessly, negligently and without any regard to the safety of the plaintiff, suddenly stopped said motor bus, or coach, without giving to the plaintiff any signal of his intention to do so. That the said defendant after suddenly stopping said motor bus, or coach, as aforesaid, without giving the signal required by law, or any signal, and after the plaintiff had approached within a short distance of the said coach of the defendants, and after making known his intention to said defendants, this plaintiff attempted to drive by and pass said passenger coach of said defendants, whereupon after said plaintiff was in the act of driving by the said defendants' coach, while the same was at a standstill, the said defendant, through its operator, driver and agent, suddenly started said coach, and in starting same pulled it into the road in front of the truck which this plaintiff was driving, and making it impossible for him to turn his said truck to the right, as he had intended to do, and proceed upon the road up Laurel River, leading to the Tennessee line, and Greenville. And the defendant, by suddenly starting said motor bus and coach, forced the plaintiff, who, in order to avoid a collision between said motor bus and said truck, to proceed along State Highway No. 20, and onto the bridge which spans Laurel River. That the said defendant, after negligently stopping the motor bus, as aforesaid, without giving any signal, and notwithstanding the fact that he suddenly started the same, while this plaintiff was passing with his said truck, without giving any signal, and in violation of the law, and after the said defendants saw the plaintiff in a perilous condition, which was caused by the negligence of the said defendant, the said defendant proceeded with much force and power on said bridge, and by the negligent operation of his said motor bus caught some portion of the truck which this plaintiff was driving, with said motor bus, and notwithstanding the fact that the said plaintiff did all in his power to stop said truck, yet the said defendant negligently caught and pulled the said truck, which the plaintiff was driving, on said bridge, and nearly across the same, in fact more than one hundred feet thereon, and while thus negligently pulling the said truck of said plaintiff, the said defendant swerved his said bus to the left upon said bridge, until, by so doing, he forced the truck which this plaintiff was driving off said bridge, and caused it to fall, with this plaintiff, into Laurel River. . . . That all the plaintiff's said injuries were due to the wanton, wilful, reckless and negligent conduct of the said defendants in: (A) Stopping his said coach, or motor bus, without giving any signal, as required by law. (B) In that after stopping the said motor bus he negligently and recklessly, and without regard to the law or the rights of the plaintiff, suddenly started said motor bus while the plaintiff was in the act of passing same, and pulling said motor bus directly in front of the said plaintiff, and his moving truck,

MURPHY *v.* COACH Co.

as hereinbefore alleged. (C) In that after he caused his motor bus to collide with the truck driven by the plaintiff, and to become engaged therewith, he refused to slow down said motor bus, but, on the contrary, continued to apply power thereto, so that the plaintiff was unable to stop his said truck, as aforesaid. (D) For that the defendant operated his said motor bus while on the said bridge crossing Laurel River, recklessly and negligently, and swerved the same to the left until it actually forced the truck, driven by the said plaintiff, off the side of said bridge, and caused it to fall, with the plaintiff, into Laurel River, as aforesaid.

The material allegations of the negligence charged by plaintiff in the complaint were denied by defendants. The defendants further answer and set up the plea of contributory negligence and also counterclaim: "That the injuries of the plaintiff were not caused by any negligence of the defendants, but were caused directly and proximately by the gross and inexcusable negligence and reckless driving of the plaintiff, in that, while the defendants were operating a bus on Highway No. 20, between Marshall and Hot Springs, which was going down a mountain grade full of curves, the plaintiff negligently and recklessly attempted to pass the defendants and negligently ran his truck into the left side of the defendants' bus and through the bridge and into Laurel River; that among the acts and things constituting the negligence of said plaintiff are the following: (a) Negligently driving his truck at a reckless and unlawful rate of speed; (b) negligently attempting to pass the defendants' bus on a heavy mountain grade full of curves in a reckless, improper and unlawful manner; (c) negligently failing to give any signal of an intention to attempt to pass the defendants' bus; (d) negligently driving his truck into the left side of the defendants' bus while the defendants' bus was being driven properly along Highway No. 20, with terrific force and in a dangerous and reckless manner; (e) negligently failing to keep his truck under proper control in going down the mountain grade where the said collision occurred; (f) negligently and unlawfully failing to slow up and sound any signal and take the precaution required by law and the rules of ordinary care in approaching the bridge across the Laurel River; (g) negligently driving his truck off the bridge over Laurel River and through the supports along the side of the bridge and into said Laurel River. That if the plaintiff was in any way injured by the negligence of the defendants, which, however, is most vigorously and strenuously denied, the said plaintiff contributed to his own injuries by the negligence of the plaintiff, which directly and proximately caused the said injuries in the particulars above mentioned. And the defendants plead said acts of contributory negligence in bar of any recovery in this action. That by reason of the

MURPHY v. COACH CO.

acts and negligence of the plaintiff hereinbefore referred to, the said plaintiff damaged the bus of defendants in the sum of five hundred dollars (\$500.00)."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover of the defendants? Answer: Six thousand, five hundred dollars (\$6,500).

4. Was the bus of defendant, Asheville-Knoxville Coach Company, Inc., damaged by the negligence of the plaintiff, as alleged in the answer? Answer: No.

5. What damage, if any, is the Asheville-Knoxville Coach Company, Inc., entitled to recover of the plaintiff? Answer: None."

The court below rendered judgment on the verdict. Defendants made numerous exceptions and assignments of error on the trial below and appealed to the Supreme Court.

The material facts and assignments of error as a whole will be considered in the opinion.

G. Lyle Jones and J. E. Swain for plaintiff.

Bernard, Williams & Wright for defendants.

CLARKSON, J. The evidence on the part of the plaintiff was to the effect that he was operating, for one L. H. Hudson, a Hup truck, weighing about 2½ tons, filled with stone, and was going from Walnut Gap Quarry and down the mountain, on highway No. 20, to Laurel River bridge to take the stone on highway No. 208 to the road work on the Little Laurel River, and was injured at about 2:30 in the afternoon of 19 April, 1929. He was going down the mountain to the intersection of highways Nos. 20 and 208 at Laurel River bridge. Highway No. 20 went from Asheville to Knoxville, Tenn., and highway No. 208 intersected it at Laurel River bridge and went west along the bank in a northerly direction to Greenville, Tenn. His course, when he arrived at the intersection of Nos. 20 and 208, Laurel River bridge was to turn to the right and go up the bank of Laurel River in a northerly direction on No. 208 to the road work. Just before reaching the intersection of Nos. 20 and 208, at the Laurel River bridge, highway No. 20 was 22 feet wide, and from the center of the bridge across the intersection was 36 feet and entering No. 208 was 24 feet wide. The bus was going on No. 20 to Knoxville, and the course of the bus, when the driver arrived

MURPHY *v.* COACH CO.

at the intersection of Nos. 20 and 208, was to turn to the left and cross over the bridge at Laurel River and follow No. 20 on to Knoxville—the course of the truck was to turn to the right and follow No. 208 to the road work where the road was being graveled. The bus was longer than the truck. The bus passed the truck some distance up the mountain, and the grade down the mountain was pretty heavy. Poston knew the truck was coming behind him.

Plaintiff described the impact and what occurred at the time, in part, as follows: "When the defendant approached this bridge, he was driving. He was wobbling all over the road. He was wobbling around the road. He slowed down and stopped right here, just at the intersection of the bridge. When he slowed down and stopped at that point, I reached down, blowed my horn and started to pass. He cut across the road to the left in front of me. Q. Did he show any signal or make any sound at all? A. No, I did not see any. No sir. He was where I could see him. I was looking at him. When I started to go past him he cut across the road in front of me with the bus, when he cut across the road in front of me, I did not have no room to go by nor get on the bridge either. The right corner of my bumper hit the bus. I cut out and got on the bridge. He caught my tail gate and shoved me off the bridge. I turned onto the bridge. . . . I had my brakes on all I could get them on. The brakes were working; both wheels were sliding, I mean I had them locked. . . . The bus and truck came apart when he knocked me off the bridge, when the truck went over the bridge. I was still on that truck when I went over that bridge. I went in the water. . . . I operated my truck with my right foot. I operated my clutch with my left foot. I set my foot on the clutch and blowed my horn at the same time. The bus passed me somewhere on one of those curves—I don't know where. . . . I was not going so fast I don't think; something like 15 or 20 an hour, down the mountain. . . . There was no place for me to go. He cut right in front of me. . . . I guess he was about 30 feet from the bridge when he stopped. I thought he was going on toward Greenville. . . . I started to pass. When I started to pass him he cut in front of me. I am certain he stopped. I don't know whether he took on any passengers or not. Nobody was standing by the side of the road. I couldn't see on the right-hand side whether he was taking on passengers or letting off passengers. We followed one another down the mountain, I don't know how far. He was standing still when I started to pass. When I started by the truck I was traveling at the rate of 8 or 10. We both went on the bridge side by side. . . . When he first pulled in front of me on the bridge, I kind of glanced to get on the bridge to keep from knocking off in the river. I was not off my road when this happened.

MURPHY v. COACH CO.

. . . The reason I left the Greenville road was that he cut me off the Greenville road. I didn't have anywhere to go except that bridge to keep—unless I went in the river."

W. C. Ledbetter, a witness for plaintiff, testified, in part: "From the skid marks of the truck you could see the outside or upper marks that the truck had made in going across the bridge. They were about three feet or something like that from the left-hand rail. You could see the skid marks of the wheel that was nearest to that timber, that is the one I was talking about. It was about three and a half or four feet after it went on the bridge. The skid marks continued along that side 10 or 12 feet. I noticed then where the truck had got on top of this guard rail, the front axle had, and had turned off those bannisters for eight or ten feet before it had gone over. It had gone I guess 55 feet before it turned over. The bridge is 80 feet long."

C. B. Bennett, for plaintiff, testified, in part: "When I got down a little piece and looked over and saw the bus standing there and saw the truck, just saw the wheels. It was turned up. I went down, turned my truck across the bridge, parked and Mr. Poston, the bus driver, came walking from the bus. I said 'Where is the driver at?' He said 'He is in the river.' I said, 'Let's get him out.' He said 'Hell, it is not any use, he is done drowned.' He said there was not any use, with an oath to it, that he was done drowned. I said, 'I am going to try to get him out.' . . . About that time Mr. Ingle drove up. Ledbetter was not far behind him. They came down there and Mr. Murphy's brother and Mr. Ledbetter came to the water and got him. All the time I was holding his head. Poston did not come down there. . . . I talked to Mr. Poston, he was drinking, I smelled it."

There was other evidence corroborating plaintiff. This evidence was to the way the collision occurred, and as to the drinking, was denied by defendant Poston, and his evidence was corroborated by witnesses, and the further fact that he had not been drinking.

Defendants' evidence was to the effect that the bus was on the right-hand side of the center of No. 20 and it had slowed down to 10 miles an hour, and never stopped, and when it turned at the intersection of highways 20 and 208 to continue on No. 20 and cross the bridge over Laurel River, the driver, Poston, gave proper warning and used due care, and plaintiff ran the truck into the left side of the bus in front of the rear wheel.

The evidence of plaintiff sustained his allegations, as alleged in the complaint, and the evidence of defendants sustained their allegations as alleged in the answer. The defendants, at the close of plaintiff's evidence and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit, C. S., 567, which the court

MURPHY v. COACH CO.

overruled. In this we can see no error. The controversy was one of fact, which it was the province of the jury to determine. The questions of negligence, contributory negligence and proximate cause were sufficient to be submitted to the jury.

"It is the well settled rule of practice and accepted position in this jurisdiction, that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Nash v. Royster*, 189 N. C., at p. 410; *Abel v. Dworsky*, 195 N. C., at p. 867.

In *Butner v. R. R.*, 199 N. C., at p. 697, it is said: "In an action for the recovery of damages resulting from injuries caused by the negligence of the defendant, where the defendant relies upon the contributory negligence of the plaintiff, as a bar to his recovery, the burden is upon the defendant on the issue involving this defense. It is so provided in this State by statute. C. S., 523. Ordinarily, the question whether plaintiff was guilty of contributory negligence is to be determined by the jury. It is only when a clear case of contributory negligence has been made out by the evidence offered by the plaintiff, that a motion by the defendant for judgment as of nonsuit, on that ground, should be allowed."

The law of the road applicable to the facts, on plaintiff's evidence, is set forth in Public Laws 1927, chap, 148, sec. 17 (N. C. Code, 1927, Michie, annotated, C. S., 2621(59): "(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as required in this section plainly visible to the driver of such other vehicle of the intention to make such movement. (b) The signal herein required shall be given by means of the hand and arm in the manner herein specified: Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth: Left turn—hand and arm horizontal forefinger pointing. Right turn—hand and arm pointed upward. Stop—hand and arm pointed downward. All signals to be given from left side of vehicle during last fifty feet traveled."

MURPHY v. COACH CO.

The court below on the first issue, defined (1) negligence, (2) proximate cause, and charged: "The court further instructs you that a violation of a section of a statute made and intended for the protection of life and property on a highway is negligence and that if it is the proximate cause of an injury, the proximate cause of damage, it is actionable negligence."

The court below on this aspect, charged the jury: "The court instructs you that the driver of a vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as required in this section plainly visible to the driver of such other vehicle of the intention to make such movement. The signal required for stopping a motor vehicle under the section which the court has just read to you is hand and arm pointed downward and that signal to be given from the left side of the vehicle during the last fifty feet traveled. Plaintiff says and contends that defendant, Poston, violated this section of the statute and that such violation was the proximate cause of his injury. The court instructs you that if you find the defendant Poston violated this section of the statute and that such violation was the proximate cause of the injury to the plaintiff, that it would constitute actionable negligence. The court further instructs you that if you find that defendants' bus stopped and then started to pull across the road in front of the truck driven by the plaintiff without giving signal required by the statute, that is, with the hand and arm horizontal with forefinger pointed, signal given to the left of the vehicle, it would constitute negligence, and if it was the proximate cause of the injury it would constitute actionable negligence. The court further instructs you that if you find plaintiff's truck was caught in the bus and the driver of the bus continued to apply power to the bus and that said act was the proximate cause of the injury and the driver of the bus could in the exercise of ordinary care have avoided the injury, it would constitute negligence. The court further instructs you if the plaintiff has satisfied you by the greater weight of the evidence that the driver of the bus was guilty of actionable negligence, put the driver in such position that he could not avoid the injury, through attempting to do so after the danger became apparent, it is not excused by a subsequent attempt. Plaintiff says and contends, as the court previously stated in giving the contentions of the parties, that he was injured by the negligence of the defendants, as alleged in the complaint and that you should answer the first issue 'Yes.'"

MURPHY *v.* COACH CO.

In reference to defendants' plea of contributory negligence the court below, on the second issue defined contributory negligence and charged the jury: "The test is, did the plaintiff fail to exercise that degree of care which an ordinarily prudent person would have exercised or employed under similar circumstances, and was his failure to do so the proximate cause of the injury. If the defendant has satisfied you that plaintiff was guilty of contributory negligence, it would be a bar to any recovery on his part to this action. The defendants say that plaintiff was guilty of contributory negligence, that he is guilty in negligently driving his truck at a reckless and unlawful rate of speed; negligently attempting to pass defendants' bus on a heavy mountain grade full of curves in a reckless, improper and unlawful manner; negligently failing to give any signal of an intention to attempt to pass the defendants' bus; that he was guilty of negligence in driving his truck in the left side of defendants' bus while the defendants' bus was being driven properly along highway No. 20; that he was guilty of negligence in failing to keep his truck under proper control in going down the mountain grade where the said collision occurred; that he was guilty of negligence in failing to slow up and sound any signal and take the precaution required by law and the rule of ordinary care in approaching the bridge across the Laurel River; that he was guilty of negligence in driving his truck off the bridge. That his acts were the cause of the injury and not negligent acts on the part of the defendants. That the statute of North Carolina provides that 'any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person.' (Substantially C. S., 2618, in part.) The court instructs you if you find the plaintiff was operating his truck in violation of this section, and further find that such violation was a proximate cause of his injury, it would constitute contributory negligence. The court further instructs you that it was the duty of the defendants, Asheville-Knoxville Coach Company to slow down at the intersection of the Knoxville and Greenville highways, and that it was not negligence for the defendants to bring their bus to a near stop and then again across the intersection on the Knoxville highways across the Laurel River bridge. The court instructs you that defendant Poston had a right to do everything he could to keep the bus on the bridge after he was struck by the plaintiff if the plaintiff's negligence caused the collision between the truck and the bus. That you cannot find the defendant guilty of negligence in swerving

MURPHY v. COACH CO.

his bus if he did swerve on the bridge if these acts on the part of the defendant were necessary for the purpose of protecting himself and passengers in said bus from going off the bridge, if you find the plaintiff was guilty of actionable negligence in striking the bus."

In 3-4 Huddy Cyc. of Automobile Law (9 ed.—1931), sec. 145, pp. 245-6, we find: "Statutes and municipal ordinances in many cases require the driver of a motor vehicle to indicate his intention of bringing his car to a stop; and a violation of such a regulation may form a basis for a charge of negligence. Even in the absence of such a regulation, a driver is not relieved of the duty to use some care in respect to traffic in the rear; and whether the failure to give a signal to the rear is or is not negligence depends on the circumstances of the case, and usually is a question of fact for the jury. A signal that a forward vehicle is to stop should not be given unless the driver actually does so."

In the well written Law of Automobiles (North Carolina), by Vartanian, sec. 89, at pp. 193-4, we find the following: "Even in the absence of statute, the rule of the unwritten law being that the driver must exercise ordinary care to prevent collisions, it is the duty of the driver to give timely signals of warning to other drivers and pedestrians of the course to be adopted by him. He is not, for example, warranted in suddenly turning to the left without warning and without regard to conditions of travel following. It is his duty when approaching pedestrians on a public street to warn them of his approach by the sounding of a horn, gong or bell. The failure to do so constitutes negligence on his part. A pedestrian crossing at an intersection will be justified in his inference that the course of an automobile proceeding in a certain direction would not be changed without warning, especially into another street. But the burden is on the plaintiff to establish defendant's negligence in failing to warn and maintain a vigilant watch. The Uniform Act Regulating the Operation of Motor Vehicles expressly provides that the driver before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement shall give the signals prescribed by the statute plainly visible to the driver of such other vehicle, of his intention to make such movement."

In Schwartz Trials of Automobile Accident Cases, sec. 270, in part, we find: "Regulations have been prescribed which forbid turning except at street intersections. But, even if a regulation provided for turns to be made at street intersections, they must be made with due regard to the rights of other travelers. It is held that the turning of a corner

MURPHY *v.* COACH CO.

toward the left is fraught with greater danger to other travelers than is the turning toward the right. The driver wishing to turn to the left must use reasonable care to avoid a collision with a vehicle which is approaching from his rear and attempting to pass on the left side."

The jury, after deliberation, came into the court and through its foreman, asked the court certain questions, which we think the court answered correctly as to the law. Then the following question: "(Foreman) Would we consider the highway leading to Greenville, the center of the road leading the other way? (The Court) It depends. You may consider all the conditions that you found existed. It is for you to determine where the bus was and for you to determine where the truck was. Is there anything else, gentlemen? (Foreman and jurors) No, sir."

We think, under the peculiar intersection of highways Nos. 20 and 208 at Laurel River bridge, this question led into the realm of fact that the jury had to determine. At least the question is ambiguous, considering the particular location, and we cannot hold it, if error, prejudicial or reversible.

In North Carolina the Motor Vehicle Uniform Act has been substantially adopted. Public Laws 1927, chap. 148. Michie, N. C. Code, 1927, Anno., chap. 55, art. 8, sec. 2631(43) *et seq.* See subsec. (58).

We think there was sufficient evidence to be submitted to the jury of negligence of defendants after the collision, and the court below did not err in the charge to the jury on this aspect. We think the court below did not err in declining to give all the prayers for instruction as requested by the defendants. The charge as a whole covered the law applicable to the facts. We think the court below charged the jury correctly as to negligence, contributory negligence and proximate cause, and applied the law applicable to the facts.

In a long charge, we do not think technical matters contended as errors, fished out of the charge, can be held as reversible or prejudicial error, when on the whole the charge is correct. The case seems to have been unusually well tried by the court below. The entire charge and extracts from the charge before set forth show care and painstaking in the trial below. The litigants, through their able attorneys, presented every phase of the controversy, setting forth the law and contentions. It was mainly a question of fact in the province of the jury to decide. The jury could have on the facts decided either way, but that is their province, not ours. In law we find

No error.

WOOD v. TRUST CO.

JOHN A. WOOD AND HIS WIFE, MARTHA ALMA WOOD, AND THE FIRST NATIONAL BANK OF BURLINGTON, NORTH CAROLINA, v. NORTH CAROLINA TRUST COMPANY, TRUSTEE, PILOT LIFE INSURANCE COMPANY, AND MRS. BLANCHE BRINDLE.

(Filed 27 January, 1931.)

1. **Mortgages H m—Purchaser at foreclosure of second mortgage obtained good title, record failing to show that first mortgage had not been paid.**

The owner of lands executed and delivered his several bonds secured by a deed of trust on his lands to a real estate company as trustee. The bonds were purchased by various persons. The power of sale in the trust deed was duly executed, and the lands sold were purchased by an employee of the trustee under an agreement that he would hold for the trustee, and by the employee conveyed by deed to the trustor, who received a warranty deed with recitation that the trustee had received the amount bid at the sale for the purchasers of the bonds and notation duly made on the margin of page whereon the mortgage was recorded that the trust deed had been satisfied by foreclosure, the original trustor therein borrowed money on the same land by securing his notes by another deed of trust to different parties. In a suit to restrain the consummation of the foreclosure sale of the second deed of trust and the delivery by the second trustor of a deed to the purchaser thereat, *Held*: the purchaser at the second foreclosure sale was an innocent one for value unaffected by any fraud that may have existed between the owner of the land and the first trustee not appearing of record entry, and the *cestui que trust* under the second later trust deed was entitled to a priority of lien.

2. **Appeal and Error K d—Parties consenting to modification, this cause is modified and affirmed.**

The agreement of both parties to a modification of the judgment as to the amount of the recovery is upheld on appeal.

3. **Appeal and Error J c—Findings of fact supported by evidence are conclusive on appeal.**

Where the court below by agreement of the parties finds the facts as to the registered paper title to the lands in dispute, such findings are conclusive on appeal when supported by the evidence.

4. **Mortgages H p—Knowledge of attorney of alleged fraud in foreclosure of prior mortgage will not be imputed to purchaser at foreclosure of subsequent mortgage.**

Where a deed of trust on lands has been foreclosed and a deed made to a purchaser, and his grantee has conveyed the lands to another who executes another deed of trust thereon to secure notes for money loaned, the knowledge of any fraud under the first foreclosure the attorney may have had will not be imputed to the purchaser at the foreclosure sale under the second deed of trust from the fact that the same attorney acted at the different times independently in making an investigation of the title which appears to be regular and good upon the books in the office of the register of deeds of the proper county.

WOOD *v.* TRUST CO.

5. Mortgages H m—Purchaser in this case held to have obtained good title unaffected by alleged fraud in foreclosure of prior mortgage.

Where the vendor of the purchaser of lands under foreclosure lends him money on notes secured by a deed of trust on the same lands, and the title appears to be regular in the office of the register of deeds of the proper county, he acquires a lien on the lands superior to those secured by the foreclosed deed of trust unaffected by fraudulent transactions, if any, existing between the trustee in that deed and the grantor therein, of which he has not had actual notice, the foreclosure under the power of sale under the first trust deed appearing to have been regularly made, and the fraud relied on being in contradiction of the record title.

APPEAL by defendants, North Carolina Trust Company, trustee, and Pilot Life Insurance Company, from *Grady, J.*, at September Term, 1930, of ALAMANCE. Reversed and remanded.

This is an action to restrain and enjoin the defendant, North Carolina Trust Company, trustee, from executing a deed, and thereby conveying to its codefendant, Pilot Life Insurance Company, the land described in the complaint, pursuant to a sale made by the said trustee under the power of sale contained in a deed of trust executed by the plaintiffs, John A. Wood and wife, conveying said land to said trustee to secure the payment of a note executed by the said John A. Wood to the said Pilot Life Insurance Company, and for judgment and decree that the plaintiff, the First National Bank of Burlington, N. C., and the defendant, Mrs. Blanche Brindle, as holders of certain bonds executed by the plaintiff, John A. Wood, have a first lien on said land, by virtue of a deed of trust executed by the said John A. Wood and wife to the Alamance Insurance and Real Estate Company for the purpose of securing the payment of said bonds.

At the trial of the action judgment was rendered as follows:

"This cause coming on for hearing at the above-named term of court, and all parties having agreed in open court to waive a jury trial and submit the matter to the presiding judge, with the understanding that he is to find the facts and render such judgment as in his judgment the facts would justify; and evidence having been offered by the parties, the court finds the facts to be as follows:

1. Subject to the liens and incumbrances hereinafter referred to, the plaintiff, John A. Wood, at the times referred to in the pleadings, was the owner in fee simple of a certain tract of land situate in the town of Burlington, Alamance County, North Carolina, described by metes and bounds in the complaint.

2. On 14 May, 1924, John A. Wood and wife executed and delivered to the Alamance Insurance and Real Estate Company, as trustee, a deed of trust on said land in order to secure the payment of the sum of \$5,000, evidenced by ten bonds, bearing interest at the rate of 6 per

WOOD v. TRUST CO.

cent per annum, payable to bearer, or the registered holder thereof; said bonds being in the denomination of \$500 each, due and payable at the rate of \$1,000 each year, until fully paid; said deed of trust is recorded in Book 95 at page 293 of the register's office of Alamance County, and the said record is made a part of this finding of facts.

3. All of said bonds were registered, and bonds Nos. 4, 6 and 7 were retired before the institution of this action.

4. Bonds Nos. 8, 9 and 10, each in the sum of \$500, were duly registered in the name of the defendant, Mrs. Blanche E. Brindle, on 28 September, 1924, before the maturity thereof, and she is now the owner of said bonds in due course and for full value; bonds Nos. 1 and 2 were registered in the name of Dr. R. G. McPherson on 6 June, 1924; bond No. 3 was registered in the name of M. S. Gatewood on 8 July, 1924, and bond No. 5 was registered in the name of Rev. N. G. Bethea on 11 June, 1926; said bonds Nos. 1, 2, 3 and 5 are now the property of the First National Bank of Burlington, it having acquired said bonds by purchase, but the same were never registered in the name of said bank.

5. On 5 August, 1926, after advertisement, a sale of said land was made purporting to have been done under the powers contained in the said deed of trust; and the Alamance Insurance and Real Estate Company, trustee, conveyed said lands to George G. Sharpe, who at that time was an employee of the defendant, Alamance Insurance and Real Estate Company; and while said deed recited a consideration of \$5,000, nothing in fact was paid by the said George G. Sharpe to the said Alamance Insurance and Real Estate Company, trustee; said deed is recorded in Book 88, page 226, of the register's office of Alamance County. The purchase of the said lands at said sale by George G. Sharpe was made pursuant to an agreement entered into between him and the Alamance Insurance and Real Estate Company, trustee, in the original deed of trust, to the end that he, the said George G. Sharpe, should take the title to said lands and convey the same back to the Alamance Insurance and Real Estate Company.

6. On 28 August, 1926, pursuant to said agreement referred to in the next finding of fact, George G. Sharpe and his wife, Linda Sharpe, for a purported consideration of \$10, conveyed said lands to the Alamance Insurance and Real Estate Company by deed recorded in Book 86 at page 285; but the Alamance Insurance and Real Estate Company paid nothing to the said George G. Sharpe for said land.

7. On 26 January, 1927, for a purported consideration of \$10, which was never paid, the Alamance Insurance and Real Estate Company attempted to convey said lands to John A. Wood, and did in fact execute and deliver to him a deed for said land with full covenants of war-

WOOD *v.* TRUST CO.

ranty and seizin; the said John A. Wood being the grantor in the original deed of trust hereinbefore referred to.

8. The court finds as a fact that said attempted foreclosure and sale of the lands in question was fraudulent; and done for the purpose, in so far as the Alamance Insurance and Real Estate Company is concerned, of defrauding the holders of the bonds secured by said deed of trust; and the court further finds that nothing was paid to the holders of the bonds which form the basis of this action, to wit, bonds Nos. 1, 2, 3, 5, 8, 9 and 10.

9. On 6 December, 1926, the plaintiff, John A. Wood, made application to the defendant, Pilot Life Insurance Company, for a loan of \$5,000, which application was made through and by the Alamance Insurance and Real Estate Company, the name of the said John A. Wood having been signed to said application by some officer of said Alamance Insurance and Real Estate Company; said application offered as security for said loan a deed of trust upon the same lands hereinbefore referred to, and being the same lands described in the deed of trust from John A. Woods to the Alamance Insurance and Real Estate Company, trustee; and in said application it is stated that the loan is desired by the said John A. Wood for the purpose of repaying a present loan to the Alamance Insurance and Real Estate Company, and secured by a mortgage upon said property.

10. Pursuant to said application the title to said property was examined by E. S. W. Dameron, attorney for the Pilot Life Insurance Company, residing at Burlington, N. C., who prepared an abstract of title to said land, which was submitted to said Pilot Life Insurance Company; said abstract is hereby filed and made a part of this finding of fact. In said abstract, attention is called to the deed of trust from John A. Wood to the Alamance Insurance and Real Estate Company, trustee.

The said E. S. W. Dameron, attorney at law, was also the attorney at law for the said Alamance Insurance and Real Estate Company, trustee, in the foreclosure or attempted foreclosure of the deed of trust from John A. Wood and wife to said Alamance Insurance and Real Estate Company, and there appears upon the margin of the record where said deed of trust is recorded the following entry: 'The property described in this deed of trust sold under foreclosure on 3 May, 1926. (Signed) Alamance Insurance and Real Estate Company, trustee, by Dameron, Rhodes & Thomas, attorneys.' Said entry is in the handwriting of the said E. S. W. Dameron.

11. The application of the said John A. Wood for said loan of \$5,000 was accepted by the defendant, Pilot Life Insurance Company, and the abstract of title above referred to was prepared at the instance of the

WOOD *v.* TRUST CO.

said Pilot Life Insurance Company, as set out in article 4 of the second and further defense of the said Pilot Life Insurance Company; and pursuant to said application and abstract, the plaintiffs, John A. Wood and his wife, executed a note for \$5,000 to said Pilot Life Insurance Company, dated 2 February, 1927, payable \$500 a year for ten years on 2 February of each year; and the said John A. Wood and wife secured said note by a deed of trust of even date therewith upon the lands described in the original deed of trust from John A. Wood and wife to the Alamance Insurance and Real Estate Company, which latter deed is recorded in Book 108, page 1111 of the register's office of Alamance County.

12. On 2 June, 1927, the Pilot Life Insurance Company sent to Walter E. Sharpe, manager of the Alamance Insurance and Real Estate Company, a check for \$5,000, payable to the order of John A. Wood and the Alamance Insurance and Real Estate Company, which check was endorsed by John A. Wood and the Alamance Insurance and Real Estate Company, per S. C. Huffines, treasurer, and was deposited in the bank, duly collected and placed to the credit of the said Alamance Insurance and Real Estate Company; and no part of the same was ever paid out in satisfaction of the bonds held by the plaintiff, the First National Bank of Burlington, N. C., and the defendant, Mrs. Blanche E. Brindle.

The Pilot Life Insurance Company had no actual notice of the fact that said bonds had not been paid.

13. The court finds as a fact that the Pilot Life Insurance Company, owing to the facts hereinbefore found, constituted the said Walter E. Sharpe as its agent for the purpose of receiving and distributing the loan of \$5,000 made by it to the said John A. Wood, and to see that its deed of trust was a first lien upon said property, and that his failure to account for said moneys, and the resultant misappropriation thereof, was not due to any neglect or fault on the part of the plaintiff, First National Bank of Burlington or of the defendant, Mrs. Blanche Brindle, neither of whom had actual knowledge of the foreclosure of the deed of trust from John A. Wood and wife to said Alamance Insurance and Real Estate Company.

Upon the foregoing facts it is ordered and adjudged:

1. That the defendant, Mrs. Blanche E. Brindle, have and recover of the plaintiff, John A. Wood, the full sum of \$1,500, with interest thereon from 14 May, 1928.

2. That the plaintiff, the First National Bank of Burlington, N. C., have and recover of the plaintiff, John A. Wood, the sum of \$2,000, with interest thereon from 14 May, 1928.

3. That the deed of trust from John A. Wood and wife to the Alamance Insurance and Real Estate Company, dated 14 May, 1924, and

WOOD v. TRUST CO.

recorded in Book 95, page 293, of the register's office of Alamance County, is a first lien upon the lands described therein and superior to the lien of the North Carolina Trust Company, trustee, and to any rights which the Pilot Life Insurance Company has therein.

It is further ordered and adjudged that the said North Carolina Trust Company and the Pilot Life Insurance Company be perpetually restrained and enjoined from foreclosing or attempting to foreclose the deed of trust made to said North Carolina Trust Company, trustee, by John A. Wood and wife; and the attempted foreclosure thereof referred to in the pleadings is hereby declared null and void.

4. It is further ordered, adjudged and decreed that the lands described in said deed of trust be sold at the courthouse door in Graham, Alamance County, North Carolina, after due advertisement, as provided by law, in the case of foreclosure of mortgages and deeds of trust, and to this end that Cooper A. Hall, Esq., is hereby appointed commissioner of the court to make said sale, and to convey said lands to the highest bidder, in fee simple, after any sale made by him shall have been reported into court and confirmed.

Out of the moneys derived from the sale of said lands, said commissioner will first pay off the several bonds held by the plaintiff, First National Bank of Burlington, N. C., and by the defendant, Mrs. Blanche E. Brindle, if said proceeds are sufficient to pay said amount in full; and if not, he will pro rate the amount received for said lands between the First National Bank of Burlington, N. C., and Mrs. Blanche E. Brindle, in accordance with their respective claims; if there be any surplus, after paying off and discharging said bonds, and such costs and commission as may be allowed to him by the court, he will pay the same over to the Pilot Life Insurance Company in satisfaction of the note held by it; and if there still be any balance, he will pay the same over to the plaintiff, John A. Wood.

5. It is further ordered and adjudged that the defendant, Pilot Life Insurance Company, have and recover of the plaintiff, John A. Wood, the sum of \$5,000, with interest thereon at the rate of six per cent per annum from 2 February, 1928.

6. It is ordered that the cost of this action be taxed against the defendants, North Carolina Trust Company and the Pilot Life Insurance Company."

From the foregoing judgment the defendants, North Carolina Trust Company and Pilot Life Insurance Company, appealed to the Supreme Court, assigning as errors (1) the finding by the court of certain facts as set out in the judgment, on the ground that there was no evidence to support said findings; (2) the failure of the court to find certain facts which all the evidence tended to establish, and (3) the judgment, to which appellants duly excepted.

WOOD v. TRUST Co.

*Cooper A. Hall, Leo Carr and John A. Bailey for appellees.
Hoyle & Harrison and Hines, Kelly & Boren for appellants.*

CONNOR, J. The defendants, North Carolina Trust Company, and Pilot Life Insurance Company, on their appeal to this Court assign as error the failure of the court below to find, as facts material to the judgment in this action, (1) that the plaintiff, John A. Wood, is indebted to the defendant, Pilot Life Insurance Company, in the sum of \$5,000, the amount of the note executed by said plaintiff, and payable to said company, with interest thereon from 2 February, 1928, and that said plaintiff is also indebted to said company in the sum of \$511.08, the amount paid by it for taxes and paving assessment for the years 1927 and 1928, on the land described in the deed of trust from said John A. Wood and wife to North Carolina Trust Company, trustee, to secure said indebtedness; (2) that the plaintiff, John A. Wood, was in default in the payment of said indebtedness on and after 2 February, 1928, and that said deed of trust was properly foreclosed by sale of the land described therein on 18 March, 1929, under the power of sale contained in said deed of trust; and (3) that at said foreclosure sale the defendant, Pilot Life Insurance Company, was the purchaser of said land at and for the sum of \$650.

In their brief filed in this Court the plaintiffs and the defendant, Mrs. Blanche E. Brindle, appellees, admit that all the evidence at the hearing of this action shows that the defendant, Pilot Life Insurance Company, paid the sum of \$511.08, for taxes and paving assessment for the years 1927 and 1928, on the land described in the deed of trust, upon the default of the plaintiff, John A. Wood, in the payment of said sum, and consent that paragraph 5 of the judgment may be modified by including the said sum of \$511.08, with interest, in the amount of the judgment rendered in favor of the defendant, Pilot Life Insurance Company, and against the plaintiff, John A. Wood. The other facts involved in the contentions presented by these assignments of error, are admitted in the pleadings and shown by the undisputed evidence at the hearing. These assignments of error are sustained. As these facts are admitted in the pleadings, and in the brief filed by the appellees in this Court, the action is not remanded to the Superior Court for further finding as to these facts.

Defendants' assignment of error based on their exception to that part of paragraph 3 of the judgment in which it is adjudged that the foreclosure of the deed of trust from John A. Wood and wife to North Carolina Trust Company, trustee, is null and void, must be sustained. Upon the facts admitted in the pleadings and found by the court, pertinent to the cause of action alleged in their complaint, the plaintiffs, John A.

WOOD *v.* TRUST CO.

Wood and wife, are not entitled to judgment in this action that the defendant, North Carolina Trust Company, trustee, be restrained and enjoined, perpetually, from foreclosing said deed of trust, or from executing a deed conveying the land described therein to the defendant, Pilot Life Insurance Company, the purchaser at the foreclosure sale on 18 March, 1929, upon the payment by said purchaser of the amount of its bid. It is immaterial to the cause of action on which plaintiffs, John A. Wood and wife seek to recover on this action, whether the plaintiff, the First National Bank of Burlington, N. C., and the defendant, Mrs. Blanche E. Brindle, have a lien on the land described in the complaint, by virtue of the deed of trust from John A. Wood and wife to the Alamance Insurance and Real Estate Company, superior to the title which was conveyed by the said John A. Wood to the North Carolina Trust Company by the deed of trust subsequently executed by them. This deed of trust was valid, and default having been made by John A. Wood in the payment of the indebtedness secured thereby, the foreclosure sale, made in compliance with the terms of the power of sale contained therein, was valid. The defendant, Pilot Life Insurance Company, the purchaser at said sale, upon compliance with the terms of its bid, is entitled to a deed conveying to said purchaser all the right, title and interest of the plaintiffs, John A. Wood and wife in the land described in the deed of trust. The temporary restraining order enjoining the defendant, North Carolina Trust Company, trustee, from executing said deed, or from foreclosing the deed of trust, should be dissolved. There is error in the judgment perpetually restraining and enjoining the foreclosure of the deed of trust from John A. Wood and wife to the North Carolina Trust Company, trustee. Whether or not the purchaser at the foreclosure sale of the land described in the deed of trust will take title to the same subject to the prior lien of the holders of bonds secured by the deed of trust to the Alamance Insurance and Real Estate Company, cannot affect the validity of the deed of trust, or the right of the trustee to foreclose the same.

Defendants assign as error so much of paragraph 3 of the judgment as adjudges that the deed of trust from John A. Wood and wife to the Alamance Insurance and Real Estate Company, trustee, under which the plaintiff, the First National Bank of Burlington, N. C., and the defendant, Mrs. Blanche E. Brindle, claim, is a first lien on the land described therein, and that said lien is superior to the lien of the North Carolina Trust Company, trustee, by virtue of the deed of trust to said company, under which the defendant, Pilot Life Insurance Company, claims. For the purpose of determining the validity of this assignment of error, the facts as found by the court below, with respect to the record title to the land described in the complaint, at the date of the deed of

WOOD v. TRUST CO.

trust from John A. Wood and wife to the North Carolina Trust Company, trustee, are conclusive.

When examined by the attorney for the Pilot Life Insurance Company, prior to its acceptance of the application of John A. Wood for a loan of \$5,000, to be secured by a deed of trust on the land described in the complaint, the records in the office of the register of deeds of Alamance County showed that the deed of trust from John A. Wood and wife to the Alamance Insurance and Real Estate Company had been foreclosed by a sale of the land conveyed thereby on 3 May, 1926. An entry on the margin of the record of said deed of trust, in compliance with the provisions of C. S., 2594(a) was made by the duly authorized attorneys of the Alamance Insurance and Real Estate Company, trustee. The record on this appeal shows that on 3 May, 1926, the Alamance Insurance and Real Estate Company, trustee, reported said sale to the clerk of the Superior Court of Alamance County, and that said report was duly recorded by said clerk in his office.

The said records in the office of the register of deeds of Alamance County further showed that on 5 August, 1926, the Alamance Insurance and Real Estate Company, grantee, conveyed the land described in the deed of trust from John A. Wood and wife to said trustee, to George G. Sharpe, the purchaser at said foreclosure sale, by deed duly executed and recorded. This deed contains a recital that the grantee had complied with his bid as purchaser at the foreclosure sale, and had paid to the trustee the amount of his bid, to wit, the sum of \$5,000. By deeds subsequently executed and recorded, prior to the registration of the deed of trust from John A. Wood and wife to North Carolina Trust Company, trustee, the said land had been conveyed to the said John A. Wood, who thus claimed under the purchaser at the foreclosure sale made on 3 May, 1926. There was nothing on record in Alamance County showing that the said purchaser had not paid the amount of his bid to the trustee or that the trustee had not applied the purchase money in payment of the bonds secured by the deed of trust. The court below found as a fact that the Pilot Life Insurance Company had no actual notice of the fact as found by the court, that said bonds had not been paid.

The court found as a fact that the attorney who conducted the foreclosure sale for the Alamance Insurance and Real Estate Company and who signed the entry on the margin of the record, showing that the deed of trust from John A. Wood and wife to the Alamance Insurance and Real Estate Company, trustee, had been foreclosed by the sale of the land conveyed thereby, also examined the records and made therefrom an abstract of title to said land as attorney for the Pilot Life Insurance Company. It was not found by the court, nor was there evidence tend-

WOOD v. TRUST CO.

ing to show, that said attorney knew either that the purchaser at the foreclosure sale did not pay the amount of his bid to the trustee, or that the trustee did not apply the amount of said bid to the payment of the bonds secured by the deed of trust. It may well be that said attorney had no knowledge of either of said facts, but whether he had or not, is immaterial as affecting the rights of the Pilot Life Insurance Company under the deed of trust from John A. Wood and wife to the North Carolina Trust Company. On the facts of the instant case, the knowledge of its attorney, acquired while acting as the attorney for the Alamance Insurance and Real Estate Company, trustee, of facts not disclosed by the record, although affecting the title of the purchaser at the foreclosure sale to the land conveyed to him, cannot be imputed to the Pilot Life Insurance Company as notice of these facts. *Arrington v. Arrington*, 114 N. C., 151, 19 S. E., 351. The Pilot Life Insurance Company, as an innocent purchaser for value, had a right to rely and did rely on the record as the source of its information with respect to the title of John A. Wood to the land described in the complaint. This record showed conclusively that the deed of trust from John A. Wood and wife to the Alamance Insurance and Real Estate Company had been foreclosed, and that the purchaser at the foreclosure sale had acquired title to the land conveyed by said deed of trust freed from the claims of the bondholders. If the said foreclosure was fraudulent, as found by the court, it was fraudulent only as to John A. Wood and wife, who thereafter took title to said land from the grantee of the purchaser, and as to the bondholders, who knew that by the provisions of the deed of trust the trustee had the power to foreclose the same, at its option, and upon a sale of the land described in the deed of trust, to convey the same to the purchaser upon payment by him of the purchase money to the trustee. Neither John A. Wood and wife, nor the bondholders, can rely on the fraudulent foreclosure of the deed of trust to defeat the rights of the defendants who are innocent purchasers for value, claiming title under the purchaser at said sale. There is error in the judgment that the plaintiff, the First National Bank of Burlington, N. C., and the defendant, Mrs. Blanche E. Brindle, have a lien on the land described in the complaint which is superior to the lien of the defendant, Pilot Life Insurance Company, under the deed of trust from John A. Wood and wife to the defendant, North Carolina Trust Company.

This action is remanded to the Superior Court of Alamance County in order that judgment may be entered on the facts found by the court in accordance with this opinion. It is so ordered.

Reversed.

HILL v. INSURANCE CO.

CARRIE E. HILL (MONROE) v. PHILADELPHIA LIFE INSURANCE COMPANY.

(Filed 27 January, 1931.)

- 1. Insurance K a—Agreement of general agent to extension of time for payment of premium note held to waive right to forfeit policy for nonpayment.**

Where the insured in a life insurance policy has obtained from the general insurance agent, having the authority express or implied, an extension of time for the payment of his premium as stipulated in his policy, by a cash payment and two renewal notes, one of which he pays when due, and the insurer has received in cash an amount sufficient to pay the pro rata part of the premium until insured's death, which occurs after the due date of the second premium note, and the beneficiary has theretofore agreed with the general agent upon an extension of time for the payment of the second premium note to a date which had not been reached when the insured died, *Held*: the courts will not decree a forfeiture for the default in the payment of the second extension note.

- 2. Insurance J b—Forfeiture of insurance contracts are not favored but forfeiture will be enforced if plainly incurred.**

In construing a contract of life insurance the law will avoid a forfeiture for nonpayment of premiums when this can be done by reasonable construction, but a forfeiture will be enforced if plainly incurred by the terms of the policy unless there is an express or implied waiver by the insurer.

- 3. Trial D a—On motion as of nonsuit all evidence will be taken in light most favorable to plaintiff.**

Upon defendant's motion as of nonsuit the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment therefrom, and every reasonable inference in his favor.

- 4. Judgments L a—Judgment of nonsuit on merits is not a bar to subsequent action when the evidence is not substantially identical.**

The plea of estoppel by a former judgment of nonsuit in an action between the same parties will not be sustained if the pleadings and evidence therein are not substantially identical, and on appeal it is not required that the trial judge in denying the plea to set forth the facts showing the difference, it being discretionary with him. *Midkiff v. Ins. Co.*, 198 N. C., 568.

APPEAL by defendant from *Sink*, *Special Judge*, at June Term, 1930, of MECKLENBURG. No error.

This is an action brought by plaintiff against defendant on a \$5,000 policy of insurance in defendant's company, payable to her as beneficiary on the life of her husband, M. Lomax Hill, issued 26 July, 1926. The policy No. 90479 was duly delivered by defendant upon which plaintiff is suing. The first annual premium of \$167.65 was paid. The

HILL v. INSURANCE CO.

allegations in the complaint, in part, are as follows: "That at the times mentioned in this complaint the said C. Y. Coley was a general agent and supervisor of the defendant within the State of North Carolina, and was in charge of its branch office in the city of Charlotte, N. C. That, as hereinbefore stated, prior to the maturity date of the note due 26 January, 1928, the defendant, acting through its duly authorized agent, Coley, expressly assured the plaintiff that the payment of said note would be extended until on or about 1 March, 1929, and assured the plaintiff that said policy of insurance would remain in full force and effect until such time; that the plaintiff, knowing that the said Coley was a duly authorized agent and representative of the defendant, relied absolutely upon the assurance thus given her to the effect that said policy of insurance was remaining in full force until the time indicated; that, by reason of the authority conferred upon the said Coley and that, by reason of the prior acts and conduct of the said Coley in extending the time for the payment of premiums and premium notes and in receiving the payment thereof after due date, and that, by reason of the knowledge and acquiescence of the defendant in such conduct on the part of its agent and other agents, the plaintiff expressly alleges that the defendant waived the right to forfeit said policy by reason of the nonpayment of said note at the maturity date thereof."

These allegations were denied by defendant.

Plaintiff's evidence was to the effect that on 26 August, 1927, M. Lomax Hill paid to W. B. Brown, who was secretary and treasurer of the Gordon Insurance and Investment Company, agency managers Southeastern Division of defendant company, the sum of \$50 cash, and that at the same time in order to secure an extension of time in which to pay the balance of the premium, which was due on the 26th of the preceding month, he executed and delivered to the said W. B. Brown two certain paper-writings, in one of which provided the policy should be in force on that date, he promised to pay to the Philadelphia Life Insurance Company the sum of \$52.17 on 26 October, 1927; and in the other the sum of \$52.17 on 26 January, 1928. The first of the two notes, the one due 26 October, 1927, was paid. The second note, the one due 26 January, 1928, was not paid at maturity. The assured died 24 February, 1928. The defendant claimed a forfeiture of the policy on account of the nonpayment of this second note.

Plaintiff's evidence was to the further effect: That one C. Y. Coley was not an ordinary local or soliciting agent of defendant company. He is referred to by one of the defendant's own witnesses as a general agent. Coley himself, as a witness for the defendant, testified: "I had charge of their branch office in Charlotte. I was manager of the Charlotte branch office. I had my name on the door. I had my name on the

HILL v. INSURANCE CO.

stationery. . . . I had eight or nine agents under me in this Charlotte office. I handled the mail. I got the policies. . . . As to who had charge of the collection of renewal premiums in this territory, we were instructed to help all possible to collect renewal premiums after the first premium." It was in evidence that some of the high officials of defendant had been in Coley's office in Charlotte, N. C., and also had seen his letter heads. That on Coley's office in the city of Charlotte he used the title "Supervisor." That Coley was a supervisor of the defendant company and that he covered Charlotte, Gastonia and Concord. In this large territory, Coley automatically handled the collection of notes held by the defendant for premiums on its policies.

W. S. Pemberton, a witness for plaintiff, who spent three or four hours a day in Coley's office, and was intimately familiar with the routine, testified that Coley would extend the time for payment of premium renewal notes, similar to the one in question. "I am swearing now that I have seen Mr. Coley extend time for the payment of premium notes. . . . I have seen Coley extend time. . . . I have seen Mr. Coley grant an extension of time for the payment of these extension notes, and have seen him accept payment of those extension notes after the maturity date thereof. After he collected the payment of the note after the maturity date he would mail the money to Monroe to Gordon Insurance and Investment Company."

S. B. Redwine, a witness for plaintiff, who was also in Coley's office, also testified to the same effect. He further stated that he had extended time on such notes himself acting under Coley's instructions. "These renewal premiums were not always paid in cash; part of it had to be paid in cash, but they would take a note for part of it. Mr. Coley had charge of that in this territory. I have seen Mr. Coley accept payment on these renewal notes after the maturity date of the notes. Mr. Coley did at times extend the time for the payment of these renewal notes. He has sent me out and gotten me to do that myself."

C. L. Coley himself stated that he was given a list of the notes in his territory some time prior to their maturity dates. "When the letter came about those premium notes I called on the maker of those notes. I tried to get them to pay them. I was authorized to collect them if I could and was urged to collect them if I could. I was urging the people to pay them." He admitted that frequently these note-makers could not pay promptly and would request a little indulgence, and then he said: "And sometimes when a person I knew was absolutely good would request a few days extension I would tell him he could have the extension without waiting to write in to the Gordon Company, because I knew they would give me an immediate reply when I sent it, and the practice was to extend them if desired. So when a person I knew was

HILL v. INSURANCE CO.

good asked me for an extension, I would tell them yes, and then knowing I could immediately write to the company, and if the company did refuse it, I would go back and notify the man in time to pay."

Plaintiff testified, in part: "I later had a conversation with Mr. C. Y. Coley about the middle of January, 1928 (before the note was due 26 January), at the Selwyn Hotel news stand where I was then working for Mrs. Newton. Q. State what conversation you had with Mr. Coley at that time and place? A. About the middle of January, 1928, I saw Mr. Coley and asked him could I pay the premium note on Mr. Hill's insurance. He asked me if it was made out to me; if it was I could pay it. I told him I was looking for some money from Mr. Hill, and that I wanted to pay it, but could not pay it then, and wanted to know if he could hold it until the first of March; that if I did not have the money then I would pawn my ring. He says: 'Yes, Mrs. Hill, I will hold it until the first of March.' Prior to that conversation which I had with Mr. Coley, he had not made any demand on me for the payment of the note. For some time prior to that conversation with Mr. Coley I had received my husband's mail and opened it. I had not seen any mail from the Philadelphia Life Insurance Company to my husband. That was the last conversation I had with Mr. Coley before my husband's death. He told me he would hold the premium note. That is the only time I ever talked to him about this."

Jackson Maloney, vice-president of the defendant company, a witness for defendant, testified, in part: "It was customary for general agents to have that authority. Coley would have had that authority as general agent, or supervisor, or manager, as all of these officers have that authority. If he had the authority he would have come under one of these titles."

The note in question was for the balance on premium period from 26 July, 1927, to 26 July, 1928. At the time of the plaintiff's request to Coley to give extension to 1 March, 1928, the defendant had already received a \$50 cash payment and had received payment of the first note above referred to. Two-thirds of this premium had been paid, and that on a pro rata basis, the premium had been paid to 26 March, 1928. The plaintiff requested extension until 1 March, in which to pay the last note of M. Lomax Hill. He died 24 February, 1928. The witness Redwine testified that Coley would always extend the time for payment of one of these notes "to whatever time the insured wanted it extended, provided that did not go beyond the time that the amount of money he had paid on the premium would carry the insurance."

Frank G. Combes, the secretary and treasurer of the defendant company, seems to have followed this same plan in outlining the policy of the company as to taking notes for premiums. He testified: "By the

HILL v. INSURANCE CO.

pro rata portion of the premium means that you take an annual premium and divide it by twelve, and that would be the pro rata premium for one month. Now, if the note was to run for three months, then the cash portion would be three-twelfths or one-quarter of an annual premium. That is one of the conditions that we outlined to the Gordon Company."

The note in controversy, by its terms, says: "It is understood and agreed to by me that if this note is not paid at its maturity, or to the expiration of any period to which it shall have been extended."

Prior to the death of Hill, there was no notice of the forfeiture. Combes testified: "Q. Yes, but sometimes under some circumstances when you forfeited the policy you would write the policyholder and tell him of the action on the part of the company, wouldn't you? A. We would not only do that, but we would write him and ask him if he would not like to reinstate the policy, and just sign a little application for reinstatement, and say he was in good health and had not been sick, and all that sort of thing, and we would be very glad to get that note paid with that application for reinstatement. Q. And did you have certain forms for doing that? A. Yes."

There was other evidence indicating that Coley was a general agent, manager or supervisor of defendant company, and there was other evidence indicating a custom and usage on the part of Coley of extending time for the payment of notes similar to the one in question, by taking cash or other notes, or by agreeing that the note should be paid subsequent to the date of maturity, and that this was done with the knowledge or approval of the defendant company.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the policy of insurance No. 90479 issued and delivered as alleged in the complaint? Answer: Yes.

2. Was the time of payment of the premium on said policy extended by C. Y. Coley as alleged in the complaint? Answer: Yes.

3. If so, was said C. Y. Coley acting within the scope of the agency in so doing, as alleged in the complaint? Answer: Yes.

4. What amount, if any, is plaintiff entitled to recover of defendant? Answer: \$3,000."

The court below rendered judgment on the verdict. Defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones will be considered in the opinion. The other necessary facts will be set forth in the opinion.

C. A. Cochran and John M. Robinson for plaintiff.
Vann & Milliken for defendant.

HILL v. INSURANCE CO.

CLARKSON, J. The defendant, at the close of plaintiff's evidence, and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit, C. S., 567, which the court overruled. In this we can see no error.

"It is the well settled rule of practice and accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Nash v. Royster*, 189 N. C., at p. 410.

In *Hill v. Philadelphia Life Ins. Co.*, 35 Fed Rep., 2d Series, when this action was before the Circuit Court of Appeals (4th Circuit), *Soper, District Judge*, for the Court, said at p. 135-6: "We are impressed with the weight of these considerations, and it may be that they would prevail if supported by evidence on behalf of the company demonstrating that in fact the company had not authorized or acquiesced in the exercise of the power by its agent. But a verdict was directed for the defendant at the conclusion of the plaintiff's case, and it seems to us that in the present state of the record the argument goes to the weight rather than to the sufficiency of the evidence, and that the case should have been submitted to the jury to determine whether authority to waive the provisions of the policy had actually been conferred. It is clear that policyholders were frequently permitted to make part settlement of premiums due by giving their promissory notes. This was done in the case at bar when the cashier accepted the notes of the insured in part payment of the second premium. The recitals and agreements annexed to these notes, which have been set out above, indicate that the document was executed upon a form prepared by the company for such contingencies. In addition to these established facts, there is a direct testimony of Pemberton that notes were customarily used by policyholders in part payment of premiums subsequent to the first. It would seem that such notes were accepted by Coley as a matter of course in payment of premiums, were sent by him in the regular course of business to the manager of the Southeastern department of the company at Monroe, and were returned to Coley for collection fifteen days before their maturity. Coley's practice in making collections upon these notes is also significant. He collected cash whenever he was able, but oftentimes accepted renewal notes in place of cash or extended the time for payment of the notes for a few days. It does not appear that, when he exercised the discretion to grant indulgence, he had received prior authority from any superior officer in the company's employ. We

HILL v. INSURANCE CO.

think it may be fairly inferred from these circumstances, as the record now stands, that the company was cognizant of its agent's acts, that it was aware that he was extending the time for the payment of premiums without the authority of a superior officer, and that it acquiesced in his course of dealing." Numerous authorities are cited in support of the above decision.

In *Gazzam v. Ins. Co.*, 155 N. C., at p. 337 (quoting from *Quinlan v. Ins. Co.*, 133 N. Y., 365), we find: "Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company. . . . (p. 338). It is also generally held that stipulations contained in the policy, upon which it shall have its inception and become operative as a contract, may be waived. The Court says, in *Wood v. Ins. Co.*, 149 N. Y., 385, that this doctrine 'has long been settled.'" *Bullard v. Ins. Co.*, 189 N. C., 34; *Houck v. Ins. Co.*, 198 N. C., 303; *Smith v. Ins. Co.*, 198 N. C., 578.

In *Murphy v. Ins. Co.*, 167 N. C., at p. 336, it is written: "It is also held by well considered cases on the subject here and elsewhere that this provision as to forfeiture, being inserted for the benefit of the company, may be waived by it, and such a waiver will be considered established and a forfeiture prevented whenever it is shown, as indicated, that there has been a valid agreement to postpone payment or that the company has so far recognized an agreement to that effect or otherwise acted in reference to the matter as to induce the policyholder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that the forfeiture on that account will not be insisted on. *Gwaltney v. Assur. Society*, 132 N. C., 925; *McCraw v. Ins. Co.*, 78 N. C., 149; *Ins. Co. v. Eggleston*, 96 U. S., 572; *Ins. Co. v. Custer*, 128 Ind., 25; *Homer v. Ins. Co.*, 67 N. Y., 478; *Vance on Insurance*, p. 222."

HILL v. INSURANCE CO.

The principle in the above case is cited and approved in *Paul v. Ins. Co.*, 183 N. C., 159, and at p. 162, it is said: "‘A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity, on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.’ *Coile v. Com. Travelers*, 161 N. C., 104; *Ins. Co. v. Eggleston*, 26 U. S., 577; *Ins. Co. v. Norton*, 96 U. S., 234." *Arrington v. Ins. Co.*, 193 N. C., 344; *Trust Co. v. Ins. Co.*, 199 N. C., 465.

In the present case Hill (the insured) died before the extended time expired, yet no notice was given of forfeiture by the defendant, and proofs of death were duly filed with defendant company.

In Cooley's Briefs on Insurance (2d ed.), Vol. 5, at p. 3969-3970, is the following: "The authority of agents of life insurance companies, so far as the public with whom they deal is concerned, is controlled not so much by the terms of their employment or by the terms of the policies, which they procure, as by the things which the principal permits them to do by the nature and extent of the business for which they are employed and permitted to carry on (*McDonald v. Equitable Life Assur. Soc.*, 185 Iowa, 1008, 169 N. W., 352). Powers possessed by agents of insurance companies are to be interpreted in accordance with the general law of agency. *Fisk v. Liverpool & London & Globe Ins. Co.*, 198 Mich., 270, 164 N. W., 522. In *Alexander v. Continental Ins. Co.*, 67 Wis., 422, 30 N. W., 727, 58 Am. Rep., 869, it is said that this rule is absolutely necessary for the protection of the insured. He deals with no one but the agent, and the company cannot deal with its patrons in any other way. Justice and law therefore require that the company shall be held to sanction what the agent agrees to, and on which the insured relies. But where the authority of an agent does not extend to making a new contract of insurance, he cannot waive a forfeiture; and the act of such agent is not binding on insurer unless it knew, or could have known, what was done, and adopted or ratified the act, or by its act or conduct estopped itself to insist on the forfeiture (*Crook v. N. Y. Life Ins. Co.*, 75 A., 388, 112 Md., 268)." *Bank v. Sklut*, 198 N. C., 589.

We think under the law, as above set forth, and the facts and circumstances of this case, that there was evidence sufficient to be submitted to the jury that C. Y. Coley was acting within the scope of the agency when he extended the time of payment of the note given for the premium.

The next contention of defendant is practically a plea of *res judicata*, or plea in bar. We do not think this plea can be sustained.

HILL v. INSURANCE CO.

This is the fourth time this action has been heard: (1) The suit was brought in the Superior Court of Mecklenburg County, N. C., by plaintiff and against the defendant and C. Y. Coley for \$5,000, alleged to be due her as beneficiary under the policy, and was removed to the U. S. District Court for the Western District of North Carolina, on petition of defendant. At the first trial in the Federal Court a nonsuit was taken as to C. Y. Coley, and the jury failed to agree on the issues submitted, and a mistrial was ordered. (2) At the second trial in the District Court, judgment of nonsuit was entered against plaintiff and she appealed to the Circuit Court of Appeals. The cause was sent back for a new trial, the opinion by *Soper, J.*, has been quoted in part above. (3) At the third trial, in the District Court, the plaintiff took a voluntary nonsuit. (4) This action was instituted 3 February, 1930, for \$3,000, instead of \$5,000, the court having jurisdiction of that amount—the defendant being a foreign corporation.

"A plaintiff may bring an action and have it heard upon its merits and, if a judgment of nonsuit is entered, he may bring a new suit within one year or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court he may, under C. S., 415, bring a new action within the period therein specified. But, if, upon the trial of the new action upon its merits, in either event, it appears to the trial court and is found by such court as a fact, that the second suit is based upon substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res judicata* and thus end that particular litigation." *Hampton v. Spinning Co.*, 198 N. C., 240. McIntosh N. C. Practice & Procedure, sec. 627.

The present action we do not think is based upon "substantially identical allegations and substantially identical evidence." Therefore, it does not come within the *Hampton case*, *supra*. *Midkiff v. Ins. Co.*, 198 N. C., 568. It is unnecessary to set forth the facts showing the difference, nor was it necessary for the court below as a matter of law to do so—it was discretionary.

The conduct of defendant in not paying this claim does not appeal to a court of justice. Plaintiff requested C. Y. Coley (admitted by defendant to be its agent, but denying the authority of its agent to extend the note in controversy) to hold the note until the first of March. "That if I did not have the money then I would pawn my ring. He says, 'Yes, Mrs. Hill, I will hold it until the first of March'" (1928). Her husband, M. Lomax Hill, was killed on 24 February, 1928. The actual amount paid on the premium on a pro rata basis would have carried the policy until 26 March, 1928. The premium in controversy was for the

WALLACE v. BENNER.

period from 26 July, 1927, to 26 July, 1928. Of this, \$50 cash had been paid and two notes given for balance of premium. The first note for \$52.17 had been paid, which was due 26 October, 1927, and the second note for \$52.17, which this controversy is over, was due 26 January, 1928. Defendant would forfeit this \$5,000 policy, now claimed by the widow, on a technical ground, having money in its possession paid by her husband that on a pro rata equitable basis the insurance would not have expired until 26 March, 1928. Plaintiff's husband was killed over a month prior to that time. Like Portia, the witness Pemberton, who sold the policy in defendant company to the dead man, and for justice to his widow, the beneficiary in the policy, has stepped in and from his testimony and others the jury has under the law saved the forfeiture, which is "not favored either in equity or in the law." In the trial in the court below, we can find no error, the jury has found the facts in plaintiff's favor.

No error.

C. D. WALLACE, B. C. WALLACE AND L. C. WALLACE, CO-PARTNERS, DOING BUSINESS AS WALLACE BROTHERS, v. W. P. BENNER AND BETTIE F. BENNER, HIS WIFE; P. K. KENNEDY, TRUSTEE; T. B. WILDER, TRUSTEE; PAGE TRUST COMPANY AND NORTH CAROLINA JOINT STOCK LAND BANK.

(Filed 27 January, 1931.)

1. Reference C a—Court may affirm, modify, set aside, or disaffirm report of referee.

The Superior Court, on exceptions taken to the referee's report, may affirm, set aside, make additional findings, modify, or disaffirm the report. C. S., 578, 579.

2. Appeal and Error J c—Findings of fact supported by evidence are conclusive on appeal.

The findings of fact by the referee approved by the trial judge, supported by competent evidence, cannot be reviewed in the Supreme Court on appeal.

3. Mortgages E b—Party advancing funds used in payment of first mortgage is entitled to subrogation to first lien as against junior lienors.

Where the application for a loan from a Federal land bank expressly sets up prior registration mortgages on the lands and states that with the proceeds of the loan applied for the prior mortgages shall be paid (the law requiring a first lien) and the land bank accepts the application and sends its check to its attorney investigating the title to be endorsed by him and the borrower and used in conformity with the instructions that a first lien would be created on the lands for its loan, and in disobedience

WALLACE v. BENNER.

to these instructions the loan is used to pay off the first mortgage but not the second, *Held*: the land bank is entitled in equity to subrogation to the lien of the first mortgage as against the second mortgagee, and the agreement of the first lienor to this effect operates as an equitable assignment of his lien giving priority over the lien of the second mortgage.

4. Subrogation A b—Party advancing funds used to pay first mortgage lien held entitled to prior lien as against junior lienors.

Where money is advanced to discharge a mortgage encumbrance on land and the mortgage debt is thus discharged, the lender is not regarded as a mere volunteer, and is entitled under an agreement to an equitable assignment of the mortgage lien and holds the same in subrogation as against a lienor under a junior mortgage, and *held further*, that under the facts of this case the exceptions to the general rule of equitable subrogation do not apply.

5. Mortgages C c—C. S., 3311, does not apply to equitable subrogation to first lien by party advancing funds for payment of first mortgage.

Our statute requiring the registration of instruments to give priority of liens in certain instances, C. S., 3311, does not apply to the application of the equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon lands.

APPEAL by plaintiffs from *McElroy, J.*, at September Term, 1930, of MOORE. Affirmed.

Facts pertinent to this appeal, as found by the referee and modified by the judge are as follows:

In the spring of 1923, Bettie F. Benner was the owner of 300 acres of land, located in Moore County, subject to certain encumbrances which she and her husband had executed thereon, said encumbrances having priority one over the other as follows:

First, deed of trust to Thomas B. Wilder, trustee, securing principal indebtedness of \$15,000, evidenced by notes payable to Page Trust Company, dated 31 January, 1920, recorded in register of deeds office for Moore County, 16 February, 1920, Book of Mortgages 31, pages 41 and 42.

Second, deed of trust to P. K. Kennedy, trustee, securing principal indebtedness of \$1,500, evidenced by notes payable to Page Trust Company, dated 10 May, 1920, recorded in register of deeds office for Moore County, 24 May, 1920, Book of Mortgages 32, at page 177.

Third, mortgage to Wallace Brothers (plaintiffs) securing principal indebtedness of \$2,117.07, dated 15 December, 1921, recorded in register of deeds office for Moore County, 20 December, 1921, Book of Mortgages 34, at p. 537.

On or about 24 April, 1923, Bettie F. Benner made written application to defendant, North Carolina Joint Stock Land Bank of Durham,

WALLACE v. BENNER.

requesting a loan upon the usual amortization plan in the sum of \$18,500, agreeing to secure said loan with a first mortgage on the 300 acres owned by her. Said application enumerated the respective liens against the land above set forth and stated that the purpose of the loan was to pay off these prior encumbrances. Her reason for applying for this loan was because she had defaulted in payment of the first and largest lien and her lands were being advertised for sale and she hoped to save her lands by refinancing.

The defendant, Land Bank, approved this loan for \$12,500. Abstract of title was prepared and furnished by S. R. Hoyle, attorney, and Johnson & Johnson, attorneys. Said abstract set out the several encumbrances against the land. Bettie F. Benner and husband, W. P. Benner, executed note and deed of trust in favor of the defendant, Land Bank, and said deed of trust was dated 12 April, 1923, and duly recorded in registry of Moore County, 26 April, 1923, in Book of Mortgages 39, at p. 182. There was delay in closing loan due to fact that the bank could not furnish the money due to inability to market its bonds.

On 24 April, 1924, defendant bank issued its check payable to Bettie F. Benner, and Johnson & Johnson, attorneys, in the sum of \$12,273.53, which represented net proceeds of loan after deducting expenses of bank and adjusting accrued interest. The bank sent this check to Johnson & Johnson, attorneys, with instructions that prior encumbrances be removed before delivery of check, or money refunded.

In disobedience of said instructions, without procuring cancellation of prior encumbrances, and without the knowledge or consent of defendant, Land Bank, a member of the firm of Johnson & Johnson, attorneys, procured endorsement of Bettie F. Benner to said check, cashed same and disbursed proceeds thereof, after first deducting \$200 as attorney fees, as follows: Paid 1923 and 1924 taxes \$272.68, balance \$11,800.85 to Page Trust Company.

Page Trust Company applied this money as follows: \$1,250 was used for purchase of stock North Carolina Joint Stock Land Bank of Durham, and said stock was hypothecated and held as collateral security to the \$1,500, Kennedy deed of trust. This stock was later sold for \$1,300, and said amount was applied on Kennedy deed of trust. The balance of said \$11,800.85, to wit: \$11,550.85, was paid over to Page and Company—then owner and holder of Wilder deed of trust, and notes thereby secured.

At the time of receiving this money, Page and Company and Page Trust Company, through its officers, were aware of the entire situation and knew that all encumbrances against the land prior to the defendant, Land Bank's deed of trust would have to be removed or released. At

WALLACE v. BENNER.

said time, Johnson & Johnson, attorneys, represented generally, both Page and Company and Page Trust Company.

The defendant bank had no actual knowledge of the fact that its instructions had been disobeyed and prior liens not removed, until a short time before commencement of this action. The Land Bank being under supervision of acts of Congress was required by such acts to accept only first mortgages and in this case, it intended and expected to accept only a first lien, and believed and acted upon the assumption that its mortgage was a first lien until notice to the contrary was received.

All of said liens now appear uncanceled of record and the Benners have defaulted in payment of all of said liens and each lien is subject to foreclosure.

Referee's findings of facts show respective amounts due on the several liens.

Page and Company and Page Trust Company, through Johnson & Johnson, attorneys, representing them in this cause, in request for findings of facts submitted to referee, have waived their rights in favor of defendant, Land Bank, agreeing so far as their claims are concerned to recognize and allow the bank's claim as having priority.

The judgment of the court below is as follows: "This cause coming on to be heard and being heard before his Honor, P. A. McElroy, presiding judge, at the September Term, 1930, of the Superior Court of Moore County upon the plaintiffs' exceptions to the report of the referee, C. A. Armstrong, said report having been filed 15 February, 1930, and the facts having been found by the court to be as stated in said report of the referee, except as the same have been changed or modified by the statement of the court signed by his Honor which is made a part of the record in this cause, and upon and after hearing Messrs. Seawell and Seawell, attorneys for the plaintiffs, Mr. W. G. Mordecai, attorney for the defendant North Carolina Joint Stock Land Bank of Durham, and Murdoch M. Johnson, attorney for Page Trust Company and Page and Company, it is considered, ordered, adjudged and decreed that the said North Carolina Joint Stock Land Bank of Durham be subrogated to and have an equitable assignment of the liens of the defendants, Bettie F. Benner and W. P. Benner, to T. B. Wilder, trustee, and Bettie F. Benner and W. P. Benner to P. K. Kennedy, trustee, to the extent of the sum of \$12,273.53, less \$200 charged and received by Johnson and Johnson as attorneys' fees, the said sum of \$12,273.53 being the amount of the check of the said North Carolina Joint Stock Land Bank to Johnson and Johnson, attorneys, and Bettie F. Benner, and the said Johnson and Johnson, attorneys, retaining from the proceeds thereof the sum of \$200 attorneys' fees, and disbursing the

WALLACE v. BENNER.

balance, to wit, the sum of \$12,073.53, in the payment of taxes on the premises secured by the deeds of trust herein and the balance after payment of the said taxes, namely, \$11,800.85, to Page Trust Company and Page and Company for application of the indebtedness secured by the deed of trust to T. B. Wilder, trustee, and the deed of trust to P. K. Kennedy, trustee, so that the extent of the subrogation of the Land Bank to the said deeds of trust to Wilder, trustee, and Kennedy, trustee, is adjudged and decreed to be the sum of \$12,273.53, with interest thereon from 24 April, 1924.

"It is further ordered and adjudged that the defendant, Page and Company, recover judgment against the defendants, Bettie F. Benner and W. P. Benner, in the sum of \$18,825 as of 1 December, 1929; it is ordered and adjudged that the defendant, Page Trust Company, recover judgment of the defendants, Bettie F. Benner and W. P. Benner, in the sum of \$2,142.75 as of 1 December, 1929, but that the judgments for said amounts in favor of the said Page and Company and in favor of the said Page Trust Company be held in trust by the said North Carolina Joint Stock Land Bank of Durham to the extent and amount of the subrogation as hereinbefore set forth; it is further ordered and adjudged that the plaintiffs recover of the defendants, Bettie F. Benner and W. P. Benner, the sum of \$2,801 as of 23 February, 1928; it is further ordered and adjudged that the defendant, North Carolina Joint Stock Land Bank of Durham recover judgment of the defendants, Bettie F. Benner and W. P. Benner, in the sum of \$426.67 with interest thereon from 24 April, 1924, the same being the difference between the amount of the subrogation and the amount of the indebtedness owing by the said Bettie F. Benner and W. P. Benner to the said North Carolina Joint Stock Land Bank of Durham.

"It is further ordered, adjudged and decreed that the conditions of the deed of trust of the said Bettie F. Benner and W. P. Benner to T. B. Wilder, trustee, the deed of trust of Bettie F. Benner and W. P. Benner to P. K. Kennedy, trustee, the mortgage deed of Bettie F. Benner and W. P. Benner to the plaintiffs and the deed of trust of Bettie F. Benner and W. P. Benner to First National Company, trustee for North Carolina Joint Stock Land Bank of Durham have all been broken, that the equity and equities of redemption of the said Bettie F. Benner and W. P. Benner be and the same are hereby forever barred and that W. G. Mordecai and Murdoch M. Johnson be and they are hereby appointed commissioners of the court to advertise the lands mentioned and described in the pleadings herein and the different mortgages and deeds of trust herein for sale to the highest bidder, for cash, before the courthouse door of Moore County, North Carolina, at some convenient

WALLACE v. BENNER.

sales day hereafter, in accordance with law, and that they apply the proceeds of such sale as follows:

"1. To the payment of the costs and disbursements of this action up to and including the costs incurred at this term of the court, but not thereafter.

"2. Pay to C. A. Armstrong, referee, for his services as such referee herein the sum of \$200.

"3. Pay and receive to themselves for their services as commissioners an amount equal to five per centum of the proceeds of the sale.

"4. Next pay to the North Carolina Joint Stock Land Bank of Durham the sum of \$12,073.53, with interest thereon from 24 April, 1924.

"5. Next pay to Page and Company the sum of \$18,825 with interest on \$15,000 from 1 December, 1929, less the sum of \$12,073.53 and interest, being the amount paid to the said North Carolina Joint Stock Land Bank, the said Page and Company and Page Trust Company having agreed that the North Carolina Joint Stock Land Bank to the extent as above stated should have priority over both of their liens regardless of the application of the moneys received from the Land Bank and the lien of Page and Company being superior to that of Page Trust Company.

"6. Pay Page Trust Company out of any balance the sum of \$1,500 with interest thereon from 1 December, 1929.

"7. Pay Wallace Brothers out of any balance after the applications as above set forth the sum of \$2,801.08, with interest thereon from 23 February, 1929.

"8. Pay the balance, if any, to Bettie F. Benner and W. P. Benner.

"It is further ordered, adjudged and decreed that the commissioners make report of such sale to the clerk of the court and that said sale be confirmed by the clerk before the delivery of deed and that the said commissioners further make due report of their receipts and disbursements."

The only exception and assignment of error is to the judgment rendered on the findings as modified by the court below.

H. F. Seawell, Jr., for plaintiff.

W. G. Mordecai and J. Earle Baker for Land Bank.

Johnson & Johnson for defendants P. K. Kennedy, trustee and T. B. Wilder, trustee et al.

CLARKSON, J. On exceptions to report of referee on reference to report facts, Superior Court may affirm, modify, set aside, or make additional findings, and may confirm or disaffirm report. (C. S., 578, 579); *Hardaway Contracting Co. v. Western Carolina Power Co.*, 195 N. C., 649; *Mills v. Apex Ins. & Realty Co.*, 196 N. C., 223; *American Trust*

WALLACE v. BENNER.

Co. v. Jenkins, 196 N. C., 428; *First Security Trust Co. v. Lentz*, 196 N. C., 398. In a long line of unbroken decisions, the findings of fact of a referee approved by the trial judge cannot be reviewed upon appeal if supported by any competent evidence. It is only when it is objected that there is no evidence or no competent evidence in support of the findings that a question of law is raised which the Supreme Court can decide. *Caldwell v. Robinson*, 179 N. C., p. 521. In the present action there was competent and sufficient evidence to support the findings of the court below.

The question involved: Where an attorney, who is entrusted with duties of closing a loan for a Land Bank, pays over the net proceeds of the loan to the holder of a first mortgage and, in disobedience to specific instructions from the Land Bank, and contrary to the Federal Farm Loan Act which requires a first lien on farm property, fails to discharge and cancel of record said first mortgage and also a second mortgage known to exist against the land, is the Land Bank entitled to an equitable assignment of, or to subrogation in, the first mortgage to the extent of its money which has been so applied on the first mortgage as against the holder of the second mortgage who received no part of the proceeds of the Land Bank's loan and who entered into no agreement either to cancel or subrogate his lien? Under facts of this case does the waiver made by the holders of first liens against the property in favor of the defendant Land Bank operate as a legal assignment of the first liens? Under all the facts and circumstances of this case, we think the doctrine of subrogation applies and the North Carolina Joint Stock Land Bank of Durham is entitled to priority over plaintiffs.

Speaking of subrogation, in *Publishing Co. v. Barber*, 165 N. C., at pp. 487-8, it is said: "The doctrine is one of equity and benevolence, and, like contribution and other similar equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice." *Jeffreys v. Hocutt*, 195 N. C., 339; *Morris v. Y. & B. Corp.*, 198 N. C., at p. 717.

The right of subrogation has its rise, not in contract, but in equity, *Powell v. Wake Water Co.*, 171 N. C., 290. As distinguished from legal subrogation, conventional subrogation is founded on the agreement of the parties in the nature of an equitable assignment, while the former exists where one who has an interest to protect, or is secondarily liable, makes payment of the obligation. *Joyner v. Reflector Co.*, 176 N. C., 274. Many of the authorities hold, which we think correct, that the agreement can be implied from all the facts and circumstances of the particular case. The principle of subrogation does not prevail in favor of a mere volunteer. *Blacknall v. Hancock*, 182 N. C., 369.

We think the principle applicable in this case is clearly set forth in *Jones on Mortgages* (8 ed., 1928), part sec. 1114, pp. 559-560: "There is clearly no scope for the operation of the principle of equitable subrogation in a case of ordinary borrowing, where there is no fraud or misrepresentation, and the borrower creates in favor of the lender a new and valid security, although the funds are used in order to discharge a prior encumbrance. In such case, the lender is treated as a mere volunteer in the transaction. But the rule is settled that, where money is expressly advanced in order to extinguish a prior encumbrance, and is used for this purpose, with the just expectation on the part of the lender of obtaining a valid security, or where its payment is secured by a mortgage which for any reason is adjudged to be defective, the lender or mortgagee may be subrogated to the rights of the prior encumbrancer whose claim he has satisfied, there being no intervening equity to prevent. It is of the essence of this doctrine that equity does not allow the encumbrance to become satisfied as to the advancer of the money for such purposes, but as to him keeps it alive, and as though it had been assigned to him as security for the money.'" *Bigelow v. Scott*, 135 Ala., 236, sec. 1115; *Jones, supra*: "Subrogation may arise by agreement between mortgage debtor and a third person, whereby the latter, upon paying the mortgage debt, is substituted in place of the mortgage creditor in respect to the security. 'Where money is advanced to a debtor in pursuance of an express agreement that it is to be used to retire existing liens or encumbrances on his property, and that the creditor who loans the money is to have a first lien upon the property to secure its repayment, such creditor may be subrogated to the rights of the encumbrancer or lienor whose debt has been paid, not only as against the borrower, but as against any one else who subsequently acquires an interest in the property with knowledge of the circumstances under which the money to pay off the encumbrances or liens was advanced.' Also, 'if the money is advanced to a debtor to discharge an existing first mortgage upon his property, and in pursuance of an agreement that the lender is to have a first lien upon the property for the repayment of the sum loaned, the lender is entitled, as against a junior encumbrancer, to be treated as the assignee of the first mortgage which has been paid off and discharged with the money loaned, whenever it becomes necessary to do so to effectuate the agreement with the lender, and to prevent the junior encumbrance from being raised accidentally to the dignity of a first lien, contrary to the intention of the parties.'" 37 Cyc., pages 471, 472, 473, 474, 475 and 476.

In 25 R. C. L., pages 1339-40, under title "Subrogation," sec. 23, after stating that the rule of subrogation has no application to a stranger or volunteer who pays off a prior encumbrance, continues as

WALLACE V. BENNER.

follows: "And if money is advanced to a debtor to discharge an existing first mortgage upon his property and in pursuance of an agreement that the lender is to have a first lien upon the property for the repayment of the sum loaned, the lender is entitled, as against a junior encumbrancer, to be treated as the assignee of the first mortgage, which has been paid off and discharged with the money loaned, whenever it becomes necessary to do so to effectuate the agreement with the lender, and to prevent the junior encumbrance from being raised accidentally to the dignity of a first lien, contrary to the intention of the parties. This is a just and reasonable rule. It effects the intention of the parties, preserves to the payor the benefit of his payment, leaves the inferior lienor in his former position, inflicts no injury upon him, prevents injury to the payor through mistake or ignorance of the inferior lien, and works exact justice to all." R. C. L., sec. 24, pp. 1340-41. *Louisville Joint Stock Land Bank v. Bank of Pembroke*, 225 Ky., 375.

In *Bank v. Bank*, 158 N. C., at p. 243, we find: "The plaintiff's claim appeals very strongly to the conscience of the court, and we think it is sustained by well-settled principles. The doctrine of subrogation rests upon principles of natural justice and equity, and there are numerous authorities which support the rule that one who, at the request of another, advances money to pay off a security or encumbrance, in which the latter is interested or to the discharge of which he is bound, under the agreement that he shall have the benefit of the creditor's security, is entitled to be subrogated to the rights of the creditor in the security; and some cases hold that, in the absence of an express agreement, one will be implied that the security shall subsist for the use and benefit of the lender of the money, and it will be so enforced. *Gans v. Thieme*, 93 N. Y., 225; *Levy v. Martin*, 48 Wis., 198; *Wilkins v. Gibson*, 113 Ga., 31."

This Court has long recognized the equitable doctrine of subrogation in numerous cases. *Springs v. Harven*, 56 N. C., 97; *Byerly v. Humphrey*, 95 N. C., 151; *Liles v. Rogers*, 113 N. C., 197; *Cutchin v. Johnston*, 120 N. C., 51; *Moring v. Privott*, 146 N. C., 558; *Chandler v. Jones*, 172 N. C., 569; *Caldwell v. Robinson*, 179 N. C., 518; *Grantham v. Nunn*, 187 N. C., 394; *Saleeby v. Brown*, 190 N. C., 138; *Jeffreys v. Hocutt*, 195 N. C., 339; *Morris v. Cleve*, 197 N. C., 253; *Morris v. Y. & B. Corp.*, *supra*.

The exceptions to the general rule to the doctrine of subrogation: (1) The relief is not granted to a volunteer; (2) nor where the party claiming relief is guilty of culpable negligence; (3) nor where to grant relief will operate to the prejudice of the junior lien holder.

We do not think defendant Land Bank comes within any of these exceptions. We can see no injustice or wrong done plaintiffs. Plain-

IN RE HAYES.

tiffs' lien was junior to the others and they still hold the same rights they always had; on the other hand, the Land Bank would have never loaned the money, in fact, it was not permitted to do so by law, except on a first lien, and it took every precaution, that due care required, to see that it had a first lien. It would be inequitable and unconscionable if the Land Bank was not, under facts disclosed on this record, entitled to subrogation. We do not think C. S., 3311, the Connor Act, has any application to the questions here involved. The judgment below is Affirmed.

IN THE MATTER OF DR. R. B. HAYES.

(Filed 27 January, 1931.)

- 1. Contempt C a—Industrial Commissioner has power to punish for contempt a duly sworn witness who refuses to testify in proceedings before him.**

The attending physician of a claimant under the Workmen's Compensation Act who has been duly subpoenaed to attend and give evidence at a hearing by a member of the Industrial Commission, after having been duly sworn and examined and cross-examined may not refuse to give his testimony concerning a vital matter involved on the ground that he first be qualified as an expert and his fees as such fixed, and in persistently refusing to obey the order of the chairman may be punished by fine or imprisonment, the right to so punish being inherent in the Commission and necessary for the performance of its duties, and it is not required that the power be expressly given by statute. Chapter 120, Public Laws of 1929.

- 2. Witnesses A c—Amount to be paid expert witness is within discretion of the trial court.**

The amount to be paid an expert witness testifying at a hearing before a commissioner of the Industrial Commission in proceedings before him under the Workmen's Compensation Act is a question to be determined in the discretion of the court and the witness may not require that it be fixed in advance before testifying as to a material matter involved in the inquiry. C. S., 3893.

- 3. Master and Servant F i—Facts found by Industrial Commission upon supporting evidence are conclusive upon appeal.**

The facts found by a member of the Industrial Commission upon supporting evidence in a hearing before him, and approved by the full Commission, are conclusive upon the court upon appeal.

- 4. Master and Servant B a — Industrial Commission or any member thereof may subpoena witness for hearing before it or him.**

The express provision of the statute conferring upon the Industrial Commission the power to subpoena witness for a hearing before it or one

IN RE HAYES.

of its members designated for that purpose is not impaired or diminished by the provisions of the act empowering the Superior Court in proper instances to aid the Commission in procuring the attendance of witnesses at its hearings, or before any member or deputy thereof.

5. Contempt C a—Hearing before Industrial Commissioner is a judicial proceeding and he may punish duly sworn witness for contempt thereat.

The Industrial Commission proceeding under the Workmen's Compensation Act, being expressly given the authority to subpoena witnesses and have them give evidence at the hearing, acts in a judicial capacity in adjudging in contempt a witness who refuses to give material evidence, and in imposing a sentence or a fine or imprisonment under the provisions of C. S., 981.

The above-entitled cause was heard in this Court on the return to a writ of *certiorari* issued on the petition of Dr. R. B. Hayes, as a substitute for an appeal from *Harris, J.*, at Chambers. C. S., 630.

It appears from the petition for the writ of *certiorari* filed in this Court that on 5 March, 1930, the petitioner, Dr. R. B. Hayes, was arrested and held in custody by the sheriff of Orange County, pursuant to an order made by the Chairman of the North Carolina Industrial Commission on 3 March, 1930; that thereafter the said Dr. R. B. Hayes applied to the Honorable W. C. Harris, judge of the Superior Court, for a writ of *habeas corpus*, alleging in his petition for said writ that he was unlawfully imprisoned and restrained of his liberty by the sheriff of Orange County, for that the order, by virtue of which he was arrested and held in custody by the said sheriff, was without authority of law, and therefore void; and that at the hearing on the return of the writ of *habeas corpus*, issued by the Honorable W. C. Harris, his prayer that he be discharged from custody was denied, and he was remanded to the custody of the sheriff of Orange County. The petitioner prays this Court to issue a writ of *certiorari* directing that the proceedings in which the judgment denying his prayer that he be discharged from custody, and remanding him to the custody of the sheriff of Orange County, was rendered, be certified to this Court for a review of said judgment to determine whether or not there is error in said judgment as contended by the petitioner.

It appears from the return made to the writ of *certiorari* issued by this Court, pursuant to the petition therefor, that the order by virtue of which the petitioner was arrested and held in custody was made by the Chairman of the North Carolina Industrial Commission, at a hearing before said chairman on 3 March, 1930, of a cause pending before said Commission, entitled, "*J. O. Thompson, Employee, v. E. H. Clements Co., Employer, and U. S. Casualty Company, Carrier.*" The

IN RE HAYES.

said cause involved the claim of the employee to compensation to be paid by the employer, and its carrier for injuries sustained by the employee, as the result of an accident, in the course of his employment, under the provisions of the North Carolina Workmen's Compensation Act. Upon the admissions made by the parties to the cause, and entered in the record of the hearing, the Commissioner ruled that there was but one question to be decided by him, to wit, whether or not the condition of the claimant at the date of the hearing was the result of the accident and resulting injury which occurred on 19 October, 1929.

At said hearing Dr. R. B. Hayes, the physician who had attended the employee at the time he was injured, and who had filed with the Commission on 13 November, 1929, his report as such attending physician, was present as a witness for the claimant. After he had been sworn, and had testified both on direct and cross-examination, Dr. Hayes was examined by the Chairman of the North Carolina Industrial Commission, who presided at the hearing. The record of this examination is as follows:

"Q. Have you an opinion as to whether or not the blow he (the claimant) received on 19 October would have produced the paralytic stroke on 12 January? A. I have an opinion, but will not testify unless I get expert compensation.

Q. What is this opinion? A. Do you qualify me as an expert?

Q. No, sir, it is not up to me to qualify you. I can only pass upon your qualifications when I know them. I only know you are a practicing physician up to this time. A. Then I decline to express an opinion.

Q. Doctor, I again ask you to answer the question, and give me your opinion as to whether or not the claimant's present condition is the result of the accident and injury on 19th October? A. I decline to answer the question.

Q. Dr. Hayes, I ask you again to answer the question, giving your opinion as to whether or not this man's condition is the result of the accident and injury on 19th October? A. I decline to answer the question.

Q. Dr. Hayes, I have no desire to do anything that would hurt or injure you, and I hesitate to enter any judgment here that will embarrass you, but I must insist that you render proper respect to me as a court, and answer the question propounded. The question which has been asked you is the only question to be determined by the Industrial Commission at this hearing, and upon it depends whether or not this claimant will be awarded or denied compensation. I want to be entirely respectful and courteous to you, and I hope you will not let anything personal influence you in your decision to answer this question. A. I still decline to answer the question.

IN RE HAYES.

Q. Now, Dr. Hayes, I want to say to you that if there is anything personal which has entered into your refusal to answer this question, I hope you will put aside any personal feeling and consider me for the time being as a court, and entitled to the respect due to a court, and I call upon you again to answer the question propounded by the court, and in this connection I want to say to you that this hearing was had in the bedroom and at the bedside of the claimant who was your patient, because he was unable to attend court, and because he is in such condition that he needs any compensation that may be due him, and that the question of compensation cannot be decided until the question which has been propounded to you has been answered and passed upon by the Commission. A. It is my understanding that a man's opinion is his personal property, and is to be paid for at his price. An expert must be paid expert fees. That is my understanding. You have the right to order me to examine the man, and ask my opinion as an expert.

Q. Doctor, before entering any judgment, I want to say to you that if you have any doubt about your rights, and desire to advise with counsel, there are two good lawyers present, one representing the plaintiff, and the other the defendants, who will tell you what you should do under the circumstances. A. When I seek expert advice, I expect to pay for it, and I prefer to consult my own lawyer."

At the close of this examination, the Commissioner found the following facts:

"1. That Dr. R. B. Hayes is the physician who first attended the claimant after his injury, and continued to treat him as his physician until he returned to work nine days later.

2. That Dr. R. B. Hayes was duly and regularly subpoenaed as a witness to attend the hearing at the residence of the claimant, J. O. Thompson, on Monday, 3 March, at 3 o'clock p.m. That in response to said subpoena Dr. Hayes did appear in person, and was duly sworn as a witness on behalf of the plaintiff.

3. That Dr. R. B. Hayes deliberately and defiantly refused to answer the question propounded by the Commissioner, as to whether or not the present condition of the claimant is the result of the accident and injury for which the said Dr. Hayes treated the claimant.

4. That the said Dr. R. B. Hayes by his refusal to answer the question propounded by the Commissioner meant and intended to show his contempt for the court."

Upon the foregoing facts found by the Commissioner and entered in the record, it was "ordered and adjudged by the Commissioner that Dr. R. B. Hayes be confined in the common jail of Orange County, North Carolina, for a period of ten days, or until such time as he shall decide to answer the question propounded by the court. Execution to issue on 5 March, 1930."

IN RE HAYES.

Pursuant to a commitment issued by the Chairman of the North Carolina Industrial Commission, in accordance with the foregoing order, Dr. R. B. Hayes was arrested and held in custody by the sheriff of Orange County.

On the return to the writ of *habeas corpus* issued by Judge Harris, judgment was rendered as follows:

"IN THE MATTER OF DR. R. B. HAYES.

This cause coming on to be heard upon petition for writ of *habeas corpus*, duly made and filed herein, and the same being heard, and the court being of the opinion, that the said petitioner is not entitled to be discharged from the imprisonment to which he has been committed by the Chairman of the North Carolina Industrial Commission, for contempt:

"It is now, therefore, ordered and adjudged that the petition be and the same is hereby dismissed, and the petitioner will be remanded into custody.

W. C. HARRIS,

Judge holding the Courts of Tenth Judicial District of N. C."

On the return to the writ of *certiorari*, the petitioner, Dr. R. B. Hayes, contends that there is error in the foregoing order and judgment.

Fuller, Reade & Fuller and Gattis & Gattis for petitioner.

Attorney-General Brummitt and Assistant Attorney-General Siler for respondent.

CONNOR, J. The petitioner, Dr. R. B. Hayes, was correctly advised by his counsel that no appeal would lie from the judgment at the hearing on the return of the writ of *habeas corpus*. The only remedy available to the petitioner for a review by this Court of the judgment, in order to determine its validity, was a petition for a writ of *certiorari*, which in proper cases is a substitute for an appeal. C. S., 630. *S. v. Edwards*, 192 N. C., 321, 135 S. E., 37; *In re McCade*, 183 N. C., 242, 111 S. E., 3; *In re Croom*, 175 N. C., 455, 95 S. E., 903; *In re Holley*, 154 N. C., 163, 69 S. E., 872. The petition for a writ of *certiorari* was allowed. On the return to said writ, this Court has jurisdiction to review the judgment, and the proceedings in which it was rendered, in order to determine whether or not there is error of law in the judgment. The findings of fact upon which the order was made by the Chairman of the North Carolina Industrial Commission, under which the petitioner was arrested and held in custody by the sheriff of Orange County, were conclusive at the hearing on the return to the writ of *habeas*

IN RE HAYES.

corpus, if the said Chairman had the power to make the order, punishing the petitioner for contempt. These findings are also conclusive in this Court, and will not be reviewed. The only question, therefore, presented to Judge Harris for his decision, was whether the Chairman of the North Carolina Industrial Commission, upon the facts shown by the record of the hearing before said Chairman, had the power to adjudge the petitioner in contempt, and upon such adjudication to order that he be imprisoned in the common jail of Orange County for a period of ten days as punishment for such contempt. Judge Harris answered this question in the affirmative, and thereupon refused to discharge the petitioner and remanded him to the custody of the sheriff of Orange County. We are of the opinion that there is no error in the judgment rendered by Judge Harris.

The question raised by the petitioner at the hearing before the Chairman of the North Carolina Industrial Commission by his refusal to answer the question propounded to him by the said Chairman, on the ground that the question was addressed to him as an expert, and that he could not be required to answer the question until he had been paid, or until he had been assured by the said Chairman that he would be paid, a fee as an expert witness, in amount satisfactory to him, is not presented on the record now in this Court. The question has not heretofore been decided by this Court. It has, however, been presented to and decided by courts in other jurisdictions. It has been held in a few cases that a witness who has been summoned as an expert in a judicial investigation cannot be adjudged in contempt for refusing to give such testimony unless he has been compensated for his professional opinion. The better opinion, however, is that an expert summoned to testify who refuses to answer questions without compensation other than his witness fees is in contempt. And when an expert voluntarily submits himself to an examination as such, he can in no case refuse to answer one particular question after having, without objection, answered others. 13 C. J., sec. 33, at p. 27, and cases cited in notes. In this State it is provided by statute that experts, when compelled to attend and testify as witnesses shall be allowed such compensation and mileage as the court in its discretion may allow. C. S., 3893. It would seem that this statutory provision for their compensation ought to be sufficient assurance to experts who are called upon to testify in the courts of this State, that they will be paid for their attendance and testimony a fair and reasonable amount.

On the record now before this Court, the only question presented for its decision is whether the Chairman of the North Carolina Industrial Commission, or any member of said Commission, has the power to adjudge a witness who has refused to answer a question propounded to

IN RE HAYES.

him at a hearing before said Chairman or member of said Commission, of a cause pending before said Commission, and duly assigned to said Chairman or member for hearing in contempt for such refusal, and upon such adjudication to punish the witness by imprisonment.

The North Carolina Industrial Commission, consisting of three members appointed by the Governor of the State, one of whom has been designated by him as Chairman, was created by statute. Chapter 120, Public Laws 1929. It is primarily an administrative agency of the State, charged with the duty of administering the provisions of the North Carolina Workmen's Compensation Act. In cases where an employer and an employee, subject to the provisions of said act, have agreed as to the compensation to be paid by the employer and to be received by the employee, under the provisions of the act, for injuries sustained by the employee, and resulting from an accident which has occurred during the course of the employment, a memorandum of the agreement in the form prescribed by said Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission. If, however, the employer and the injured employee fail to reach an agreement in regard to the compensation, or if after having reached an agreement, which has been approved by the Commission, they disagree as to whether said agreement has been complied with in any respect, either party may apply to the Commission for a hearing in regard to the matter in controversy and for a ruling by the Commission thereon. The Commission or any one of its members, after receipt of an application for such hearing, shall set a time and place for a hearing, and shall notify each party of such time and place. "The Commission or any of its members shall hear the parties in issue, their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings and a copy of the award shall immediately be sent to the parties in dispute."

Where the hearing is before a Commissioner, either party may have his decision reviewed by the full Commission by an application to said Commission made within seven days from the date when the notice of the award was received by such party. The award of the Commission, when the hearing was before the full Commission, or when the award of a Commissioner at a hearing before him has been reviewed by the full Commission upon the application therefor by a party to such award, shall be conclusive and binding as to all questions of fact. Either party may, however, appeal to the Superior Court from an award of the full Commission and on such appeal be heard as to alleged

IN RE HAYES.

errors of law in the award. "Any party in interest may file in the Superior Court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal; whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court."

Power is expressly conferred by the statute creating the North Carolina Industrial Commission, upon said Commission or upon any member thereof, to subpœna witnesses for either party to a cause, pending before said Commission, to attend and testify at a hearing before the full Commission or before any member thereof. A witness, when a subpœna has been duly served on him, is required to attend the hearing, and to testify, after he has been duly sworn. His answers to questions propounded to him at the hearing constitute evidence from which the Commission or the Commissioner presiding at the hearing finds the facts upon which the award is made. Without such evidence, when the facts are in dispute, neither the full Commission nor the Commissioner can perform the duties imposed by the statute. If a witness in attendance at a hearing, after having been duly sworn, can refuse to answer a question propounded to him, which is pertinent to the matters in dispute between the parties, with impunity, then it is manifest that the North Carolina Industrial Commission, created by statute to administer the provisions of the North Carolina Workmen's Compensation Act, and to determine the rights and liabilities of employers and employees, subject to its exclusive jurisdiction under the provisions of the act, is without adequate power to perform its duties prescribed by statute, to the people of this State and to the parties to a cause pending before the said Commission. It is provided in the statute that "the Superior Court shall, on application of the Commission, or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records." This provision is clearly not adequate for a situation such as that disclosed by the record of the hearing at which the petitioner herein, upon the facts found by the Commissioner and set out by him in the record, was adjudged in contempt and punished therefor. Under this provision, in proper cases, the Superior Court has the power to aid the Commission in procuring the attendance of witnesses at hearings before the Commission or before any member or deputy thereof. It does not, however, by its express terms or by implication, deprive the

IN RE HAYES.

Commission or any member thereof, while conducting a hearing as required by statute, of the power to compel a witness, in attendance at said hearing, after having been duly sworn, to testify.

It has been uniformly held by this Court and by courts of other jurisdictions that the power to punish for contempt committed in the presence of the court, is inherent in the court, and not dependent upon statutory authority. *Snow v. Hawkes*, 183 N. C., 365, 111 S. E., 621, *Ex Parte McCown*, 139 N. C., 95, 51 S. E., 957, 13 C. J., 46. Without such power the court cannot perform its judicial function. This principle is especially applicable when the contempt consists in the refusal of a witness in attendance upon the court, after having been duly sworn, to answer a question propounded to him for the purpose of eliciting evidence material to the issue to be decided by the court. On this principle with regard to the question chiefly discussed on the argument and in the briefs filed in this Court, as to whether or not the North Carolina Industrial Commission is a court, within definitions to be found in the cited cases and in the text-books, we are of the opinion that the Commission or any of its members, when conducting a hearing for the purpose of deciding questions upon which the rights and liabilities of an employer and an employee, under the North Carolina Workmen's Compensation Act, are to be determined by the Commission or by one of its members, has the power to adjudge a witness who has deliberately and persistently refused to answer a question propounded to him, in contempt, and to punish such witness for such contempt, by fine or imprisonment. C. S., 981. When conducting hearings as required by the statute, the Commission or the Commissioner, is performing duties which are judicial in their nature. These duties are prescribed by statute. It cannot be held that the Commission or Commissioner is without adequate power to perform these duties. One of these statutory duties is to subpoena witnesses, and to require witnesses, who are in attendance at a hearing, and who have been duly sworn, to testify. Upon the contemptuous refusal of such witness to testify, the Commission or Commissioner presiding at the hearing, has the power to adjudge the witness in contempt and to punish for such contempt, within the limitations prescribed by statute. *In re Oldham*, 89 N. C., 23.

In accordance with this opinion the judgment certified to this Court for review is

Affirmed.

STATE v. PORTEE.

STATE v. SAM BURNO, SIMON PORTEE AND LAWYER TUCKER.

(Filed 27 January, 1931.)

1. **Criminal Law G f—Failure of defendant to deny statement made in his hearing implicating him in crime held competent evidence against him.**

Where the defendant charged with an assault with a deadly weapon has stated to the officer arresting him that he was at his home the night the offense was committed, and his wife, then in his presence and hearing, states to the officer that he was away from home that night until a much later hour, the statement of the wife was under circumstances calling for his denial, and his failure to do so was competent evidence of his admission for the jury to consider, its weight and credibility being for them to determine.

2. **Criminal Law G q—Statement of wife to officers in presence of husband held not to be privileged communication and testimony thereof was competent.**

Where the unanswered statement of the wife tending to show the guilt of the husband of a criminal offense is competent as evidence against him, the statute excluding testimony of communications between husband and wife has no application.

STACY, C. J., dissenting; BROGDEN, J., concurs in dissent.

APPEAL by defendant Simon Portee, from *Oglesby, J.*, and a jury, at April Term, 1930, of RICHMOND. No error.

The above-named defendants were tried on a bill of indictment charging an assault with intent to kill one Bostick Williams. All three of defendants were convicted of assault with a deadly weapon and the defendant, Simon Portee, appealed from such conviction and the judgment of the court in which each of the defendants was sentenced to serve eighteen months on the county roads of Richmond County. The alleged assault was committed on 21 July, 1929.

Lawyer Tucker did not appeal. Sam Burno and Simon Portee appealed. See companion case, where no error was found in appeal of Sam Burno. Some of the assignments of error on this record are similar to those in the Burno case, and, being there considered, reference is made to that case.

The prosecuting witness, Bostic Williams, testified, in part: "I know the defendants, having known Burno about eight years; Simon Portee eight or ten years, and Lawyer Tucker four or five years. Burno was living in Hamlet but was running a drug store in Southern Pines. Portee and Tucker lived near me in the North Yard; no one lived nearer than 400 or 500 yards to me. . . . On Friday, while I was at home about midnight the defendants came to my house; they broke the door open and rushed right in on me. They all had sticks and they

STATE *v.* PORTEE.

began to beat me, and I said, 'What is the matter; what have I done?' and they did not answer, but each one hit me a lick apiece. I was so unconscious I could hear them say something but could not understand it. They hit me as many as three times and I do not know how many more. These are the scars on my head from the licks. I did not come to myself until some time Monday, and when I did, I was lying across my bed with my clothes on. . . . I was laid up between seven and eight weeks as near as I can remember."

The defendant, Simon Portee, denied his guilt and testified, in part: "I live in Hamlet, N. C. Been there between 25 and 30 years. I live in the North Yard. I was home on Saturday night, 21 July; I got home at 11:30. When I went home at 11:30, the 11:30 whistle blew when I got out of the car and started in the house. They have a whistle in Hamlet that blows at 11:30—the round-house whistle. I am employed by the Seaboard. It was around 12 when I retired. My wife and children were at home that night. I don't know what time my wife retired. She got up when the baby got sick and she said she stayed up until along about 1 or 1:30. . . . I did not leave my house that night from the time I retired until I got up next morning. I heard Bostick Williams say on the stand yesterday that I hit him with some sort of stick. I never thought of such a thing, much less hit him. I would not hit him for anything. Old Bostick knows I am a friend to him and have been since he came in town. . . . (Cross-examination): The officers come on Sunday or Monday and asked me where I was on that Saturday night, and I told them I got home at 11:30. My wife did not accuse me in the presence of the officers of having gone to Rockingham with a woman. She did not tell them in my presence that I did not get home until 1:30. I did not tell the officers I took a woman to Rockingham that night."

Officer B. L. Finch, when recalled, testified, in part: "Q. When you went to investigate the whereabouts of Simon Portee, on the night this man was beat up, where did you find him? A. I found him at home the first time. Q. Did you have a talk with him at home in the presence of his wife? A. I first talked to Simon and he told me he got home at 11 or something like that. His wife come up and wanted to know what was the trouble, and I asked her what time Simon got home, in his presence. (Simon objects.) (Offered for the purpose of contradicting Simon.) By Mr. Sedberry: Objection, as anything that his wife might have said is privileged and is not competent evidence against him. By the solicitor: I am offering it to contradict him. I am asking you first, what did Simon tell you, and all that he told you? I ask you for the conversation you had with Simon Portee and his wife when they were both together as to his whereabouts on the night this man was beat up. By

STATE v. PORTEE.

Mr. Sedberry: Objection to anything his wife said except in so far as it impeaches her. (Objection overruled; exception.) By the court: Was he present? A. Yes. (Objection; overruled; exception.) A. Simon said he got in about 11 o'clock and his wife come out to the car where Chief Miller and myself was, and I asked her—and he was present, standing there—and she said it was late in the morning after midnight, and Simon said he did carry a woman to Rockingham and was a little late getting back. And she told him if it was not for that old automobile he would not be in trouble; that that was keeping him out late at night. (Motion to strike out that part of the answer wherein witness has stated things that contradicted Victoria Portee unless it is limited to the impeachment of the witness. Objection overruled, and the defendant, Portee, excepts.)"

The defendant Portee offers in evidence the statement made by the prosecuting witness, Bostick Williams, which is read to the jury, and which is as follows. "I realize from what the doctor says that I may die. Around two o'clock, Sunday a.m., 21 July, 1929, Sam Burno, Simon Portee and James Tucker come to my house and broke the door open and Sam Burno hit me first, James Tucker hit me with a board, Sam Burno said that he would bring me down."

The defendant duly assigned errors to the exceptions above set forth and appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. C. Sedberry for Simon Portee.

CLARKSON, J. Officer B. L. Finch, a witness for the State, had testified previously. The State had rested, then the defendant, Simon Portee, testified in his own behalf and, among other witnesses testifying for him, was his wife, Victoria Portee. Thereupon, Finch was recalled. He proceeded to testify as to a conversation he had with Simon as to when he had gone home the night of the assault. That evidence was as follows: "Simon said he got in about 11 o'clock and his wife came out to the car where Chief Miller and myself was and I asked her—he was present, standing there—and she said, 'It was late in the morning—after midnight,' and Simon said he did carry a woman to Rockingham and was a little late getting back. And she told him if it was not for that old automobile, he would not be in trouble—that that was keeping him out late at night."

The question arises was the silence of Simon Portee, under the facts and circumstances above set forth, some evidence to go to the jury to contradict him. We think the evidence competent; the probative force was for the jury.

STATE v. PORTEE.

In Underhill's *Crim. Ev.* (3d ed.), part sec. 208, it is said: "The silence of the accused as regards statements in his hearing which implicate him directly or indirectly may be proved with the statements, and from his acquiescence the jury may infer that the statements are true and that they prove his guilt. Silence is assent as well as consent, and may, where a direct and specific accusation of crime is made, be regarded under some circumstances as a *quasi*-confession. An innocent person will at once naturally and emphatically repel any accusation of crime, as a matter of self-preservation and self-defense, and as a precaution against prejudicing himself. . . . For the silence to be equivalent to a confession, it must be shown that the accused heard, understood the specific charge against him, and that he heard it under circumstances not only permitting him, but calling on him for a denial, taking into consideration all the circumstances and the persons who were present." Part sec. 209: "The silence of the accused may spring from such a variety of motives, some of which may be consistent with innocence, that silence alone is very slight evidence of guilt; and, aside from the inference which may arise from the attendant circumstances, should be received with caution as proof of guilt."

In *Guy v. Manuel*, 89 N. C., at p. 86, *Ashe, J.*, speaking for the Court, said: "To make the statements of others evidence against one on the ground of his implied admission of their truth by silent acquiescence, they must be made on an *occasion* when a reply from him might be *properly expected*. Taylor on *Ev.*, sec. 738; *S. v. Suggs*, *post*, 527. But where the *occasion* is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence."

S. v. Suggs, 89 N. C., at p. 530: "Where a statement is made, either to a man or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply, the natural inference is that the imputation is well founded, or he would have repelled it. *Guy v. Manuel*, *ante*, 83; *Whar. Ev.*, sec. 1136, and cases there cited."

In *S. v. Martin*, 182 N. C., at p. 850-1, is the following: "The testimony of this witness as to statements made by the woman in the presence of the defendant was properly admitted. True, the witness said that the defendant had been drinking, and was sitting in a corner of the room when the statements were made; but he testified also that the defendant, while near enough to the woman to hear her remarks, occasionally said something himself, and that the witness, although not positive, thought the defendant was awake. It was the province of the jury to determine from the evidence whether the woman's statements were made in the hearing as well as in the presence of the defendant, whether they were understood by him, and whether he denied them or

STATE v. PORTEE.

remained silent. *S. v. Bowman*, 80 N. C., 437; *S. v. Crockett*, 82 N. C., 599; *S. v. Burton*, 94 N. C., 948; *S. v. Randall*, 170 N. C., 762."

In *S. v. Riley*, 188 N. C., at p. 73-4, we find: "Among other evidence admitted as against Riley and Steelman, it was shown that the two had the stolen car at the home of Riley's father, who lived near Pleasant Garden in said county, on Monday 9th, or Tuesday 10 December, 1923, and that defendant Steelman had there falsely introduced himself as a Mr. Brown of High Point. This testimony being from the police officer, S. J. Garnet, and John T. Carter, an agent, who testified that Steelman, having denied knowing anything about the stolen car, at the request of Mr. J. H. Riley, the latter was taken to the jail to see if he knew Steelman and could identify him as being the man who was with his son, had the car at the home of the witness, and on the meeting Mr. Riley, the father, said: 'Yes, sir, you are the man that was at my house and introduced yourself as Brown from High Point.' True, this was a declaration of Riley, but being made in the presence of Steelman, who made no denial, it became a fact in evidence relevant to the issue. *S. v. Jackson*, 150 N. C., 831."

In *Comrs. v. Brown*, 131 Mass., 69, it is said: "A statement, made in the presence of a defendant, to which no reply is made, is not admissible against him unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply, unless he intends to admit it; but if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence," citing *Comrs. v. Kennedy*, 12 Metcalf (Mass.), 235. *Boney v. Boney*, 161 N. C., 614; *S. v. Walton*, 172 N. C., 931; *S. v. Pitts*, 177 N. C., 543; *S. v. Willoughby*, 180 N. C., 676; *S. v. Butler*, 185 N. C., 625; *S. v. Evans*, 189 N. C., 233.

We think in the present case the *occasion* called for the defendant to speak, his silence in not speaking was some evidence for the jury to consider, the probative force was for them.

Although the wife is not a competent witness against her husband, in a trial of a criminal action, her declarations made in his presence and in the presence of a third party, and naturally calling for some action or reply, if untrue, he remaining silent, are admissible in evidence. The defendant's exception and assignment of error to the admission of the testimony was on the ground that it was, in effect, using the wife as a witness against her husband, contrary to the statute, is untenable.

In *S. v. Graham*, 194 N. C., at p. 466-7, *Adams, J.*, speaking for a unanimous Court, said: "Mrs. Doss Bowen was permitted to testify that a short time before the homicide the prisoner took a pistol from his pocket in her presence and in the presence of his wife, whereupon the

STATE v. PORTEE.

latter addressing her husband remarked, 'You broke in my trunk and got it.' This was objected to; but the objection was properly overruled. Although the wife is not a competent witness against the husband in the trial of a criminal action, her declarations made in his presence, and in the presence of a third party, and naturally calling for some action or reply if untrue, he remaining silent, are admissible in evidence. *S. v. Record*, 151 N. C., 695; *S. v. Randall*, 170 N. C., 757; *S. v. McKinney*, 175 N. C., 784; *S. v. Evans*, 189 N. C., 233."

For the reasons given, we find

No error.

STACY, C. J., dissenting: The statements made by Victoria Portee to officer O. L. Finch, in the presence of her husband, were offered for the express purpose of contradicting Simon Portee. Defendant's motion to limit this evidence to impeachment of Victoria Portee, who, in her testimony, denied making said statements, was overruled. The competency of these statements, therefore, depends upon whether the occasion was such as to render the defendant's silence at that time tantamount to an admission by acquiescence of the truthfulness of said statements. *S. v. Jackson*, 150 N. C., 831, 64 S. E., 376.

The rule, generally followed, is, that statements made to or in the presence and hearing of a person, accusing him of the commission of or complicity in a crime, are, when not denied, admissible in evidence against him as warranting an inference of the truth of such statements. 1 R. C. L., 479.

The fact that said statements were made by the wife of the defendant or one not competent to testify against him, while material, is not regarded as controlling in determining their competency. *S. v. Record*, 151 N. C., 695, 65 S. E., 1010; *S. v. Graham*, 194 N. C., 459, 140 S. E., 26; *S. v. McKinney*, 175 N. C., 784, 95 S. E., 162; *S. v. Randall*, 170 N. C., 757, 87 S. E., 227; *S. v. Freeman*, 197 N. C., 376, 148 S. E., 450; 1 R. C. L., 480. The occasion, as colored by some circumstance or significant conduct on the part of the accused, is what makes such statements, otherwise incompetent as hearsay, competent as evidence. *S. v. Evans*, 189 N. C., 233, 126 S. E., 607.

Indeed, it has been said that the acquiescence of a party, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party, and whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must not only be such as afford him an opportunity to act or speak, but such also as would prop-

STATE V. PORTEE.

erly and naturally call for some action or reply, from men similarly situated. Taylor on Evidence, sec. 733.

When a statement is made, either to a person or within his hearing, implicating him in the commission of a crime, to which he makes no reply, the natural inference is that the imputation is perhaps well founded, or he would have repelled it. *S. v. Suggs*, 89 N. C., 527. But the occasion must be such as to call for a reply. "It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used, even though he remained silent; but it is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it." 16 C. J., 659. *

Was the present occasion such as to call for a reply from Simon Portee? I think not. *S. v. Reid*, 178 N. C., 745. He had already, in effect, made a different statement to the officers. What more could he accomplish by denying again what his wife had said?

Silence alone, in the face or hearing of an accusation, is not what makes it evidence of probative value, but the occasion, colored by the conduct of the accused or some circumstance in connection with the charge, is what gives the statement evidentiary weight. *S. v. Burton*, 94 N. C., 947; *S. v. Bowman*, 80 N. C., 432. "To make the statements of others evidence against one on the ground of his implied admission of their truth by silent acquiescence, they must be made on an *occasion* when a reply from him might be *properly expected*. But where the *occasion* is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence." *Ashe, J., in Guy v. Manuel*, 89 N. C., 82.

The character of evidence we are now considering is so liable to misinterpretation and abuse that the authorities uniformly consider it as evidence to be received with great caution and, except under well-recognized conditions, hold it to be inadmissible altogether. Hence, unless the party at the time was afforded a fair opportunity to speak, or the statements were made under circumstances and by such a person as naturally called for a reply, the evidence is not admissible at all. *S. v. Jackson, supra*.

In the instant case the defendant having, in effect, denied the statements once, evidently did not regard the occasion such as to call for their further contradiction. In this, I think he was correct. *Riley v. State*, 107 Miss., 600, 65 So., 882, L. R. A., 1915 A, 1041.

But it is said that as to whether the occasion was such as to call for a reply from the defendant was a matter for the jury to determine in passing upon the weight of the evidence. *S. v. Martin*, 182 N. C., 846,

STATE v. McRAE.

109 S. E., 74; *S. v. Walton*, 172 N. C., 931, 90 S. E., 518; *S. v. Bowman*, 80 N. C., 432; *S. v. Perkins*, 10 N. C., 376. The law is otherwise with respect to confessions. *S. v. Andrew*, 61 N. C., 205. "In this jurisdiction it is the province of the judge, and not that of the jury, to determine every question, whether of law or of fact, touching the admissibility of evidence." *S. v. Whitener*, 191 N. C., 659, 132 S. E., 603; *Munroe v. Stutts*, 31 N. C., 49.

Actual confessions are not admissible against a defendant unless they are voluntarily made. *S. v. Newsome*, 195 N. C., p. 566. Hence, "mere shadows of confessions," such as arise from silence in the face of accusations, ought not to be received in evidence unless they amount to clear admissions by acquiescence.

BROGDEN, J., concurs in dissent.

STATE v. DAVE McRAE.

(Filed 27 January, 1931.)

1. Criminal Law G l—It is proper for trial court to determine the competency of an alleged confession of the accused.

When the confession of one accused of murder is sought to be introduced upon the trial the question as to whether the alleged confession was entirely voluntary and given without inducement by fear or favor should be submitted to the trial court upon a *voir dire* for the purpose of determining its admissibility.

2. Same—Confession in this case held competent to be received in evidence.

Where it is shown on *voir dire* that the confession of the defendant was made without fear or favor and was voluntary, the confession is properly admitted in evidence and where material facts related in a confession are substantiated and corroborated by other testimony, the confession is admissible as evidence to be considered by the jury.

3. Criminal Law G q—Statement of wife of defendant leading him to confess held not to be testimony by her against him.

The fact that the wife in the presence of her husband related to the officers having him in charge certain matters tending to fix him with the crime of murder with which he was charged, leading him to confess his guilt, does not fall within that class of evidence against him which the statute forbids a wife from giving.

BROGDEN, J., dissents.

APPEAL by defendant from *Johnson, Special Judge*, and a jury, at April Term, 1930, of SCOTLAND. No error.

STATE *v.* McRAE.

The defendant was indicted for the homicide of Alfred Ellison, he was found guilty of murder in the first degree and was sentenced to be electrocuted.

The evidence was to the effect that the deceased was a small man, weighing about 140 pounds, and about 81 years old, and was operating a filling station and small store at McCormick Crossroads in Scotland County. He lived alone in the rear of the store, which was cut off by a partition. Deceased was alleged to have been killed on Friday night, 3 January, 1930. S. H. Dunlap, a rural policeman, and R. C. Miller, a deputy sheriff of the county, went to the store Saturday afternoon about 3:00 o'clock. The building was closed, the windows had blankets hanging over them and from the outside no one could see the conditions on the inside. Officer Dunlap went through a window in the gable. He opened the front door for the other officer, Miller. The back door could not be opened, the other door was locked, there was no key to it. The front door was barred. Ellison was found lying with his head at the corner of the icebox towards the door—feet back towards the stove, and almost on his face, his hand up, and blood was all over everything. In the back of his head the skull was shining; his head was busted with an axe there. The wounds were made with a sharp instrument. The cash drawer was pulled out and there was a dollar bill over behind the till of the cash drawer. There was a trunk there and the lid was up; that had been rifled; the contents of it were tousled up. An axe was found in the store, it was standing on end, between the kerosene barrel and the box, in the same room the deceased was in. The axe had fresh blood on the blade. A hat was found in the icebox, and the icebox was closed. There was blood on the hat, a hole was in the hat, and there were some white hairs on the hat at that time.

Dr. Peter McLean, an expert physician and surgeon, examined the body and found nine wounds on the head, three looked like hits and the others like slight cuts. "They looked to be made with a blunt instrument; the skull was fractured in three places; it was badly beaten up; fractured in two places."

R. C. Miller testified, in part: "I was present at the time the defendant was arrested, so was Mr. Jones, the sheriff and Mr. Dunlap. We arrested the defendant right on the State line. He was in a Ford touring car with Cornell Thomas. We arrested him about eighty-three and brought him to Laurinburg and put him in jail. I was not present when the jars were turned over to Mr. Jones. He got out of our car and went after them. We found five dollars in a pack of Chesterfield cigarettes on the defendant; five dollars was inside of the cigarettes, back in behind them; five dollars in ones; and we found

STATE v. McRAE.

some other money on him—he had on wrapped leggings—regulation wrapped army leggins, and we found a ten dollar bill stuck in the end of them where the strap fastens, and I think he had one or two dollars in paper money in his pocket. This is the money we found on the defendant; there is \$24.00 there.”

R. C. Miller and other witnesses, in the absence of the jury, were examined on the *voir dire* as to the competency of the confession made by the defendant. On the jury being brought in, the following questions were propounded to the witness: (Examination by solicitor) Q: Now, Mr. Miller, before the defendant had any conversation with you, state to his Honor and the jury whether or not you or anyone in your presence made any threat to the defendant? A. Did not. Q. State to his Honor and the jury, before the defendant had any conversation with you whether or not you or anyone in your presence offered him any reward or hope of reward or told him it would be better for him to make any statement to you? A. No, sir, did not. Q. State to his Honor and the jury whether or not anyone in your presence at any time, before the defendant made any statement to you, by means of any force whatever, forced the defendant to make any statement to you? A. We did not. Q. Go ahead and tell his Honor and the jury what, if anything, the defendant told you and the other officers in your presence about his connection with this murder, if any? (Objection by prisoner, exception.) A. He said that he went to Ellison's place and came on down by this one-armed negro's house—Josh Norman—and stayed there about twenty or thirty minutes and came on down to the filling station, Mr. Ellison's filling station, and went in and he bought a coca-cola or a soft drink of some kind, and he picked up the axe and hit the old man in the head and after he hit him he saw a little black bag over there and decided he had just as well take his money and the pistol happened to be in it and he took it home and counted it all except the pennies and nickels—that he didn't count them—and burned up the bag and later burned up the pistol and put the money in this fruit jar and hid it in the woods. He said he burned the pistol the next morning; said it was right between seven-thirty and eight o'clock when he hit the old man in the head. He said the thirty-five dollars was all there was there not counting the silver money. He said he hid the money in the woods and then he stayed at home that night and the next day and the next day and about the middle of the day or after dinner he and his wife came to town—to Laurinburg—and he found out on the streets up here the next day—he stayed over in Laurinburg that night, didn't go home—and he heard on Sunday we were looking for him and he kept dodging around. He said he had a bottle with him and was drinking but he didn't know whether that bottle there was the same

STATE *v.* McRAE.

bottle or not but it looked like it. I don't recall that he said where he got what he was drinking. He said he hit the old man once and he fell and looked like he was about to get up and he kind of tapped him again. He said when he left the filling station he went out the door and pulled the door to and turned the key and the key wouldn't come out and he left the key in the door. I didn't ask him anything about the sacks over the windows and doors. I don't remember anything else he said. That conversation was in the presence of the sheriff and Mr. Jones; the sheriff was in and around the jail there."

The entire alleged confession of the prisoner, as testified to by the witness, R. C. Miller, was in apt time, objected to by the prisoner. The objection was overruled and the prisoner excepted. Thereupon the prisoner moved the court to strike out the testimony of the witness, R. C. Miller, as to the entire alleged confession of the prisoner as testified to by said witness. Motion denied and the prisoner excepts.

The testimony of R. C. Miller as to defendant's confession, was corroborated by Sheriff F. C. McCormick and J. T. Jones. J. T. Jones also testified, in part: "I was a rural policeman of this county in January of this year. I found that piece of iron, Mr. Brown and myself found it, under the defendant's house, and at that time it appeared to be freshly burned. Q. Do you know what kind of pistol that was? A. I can't swear but I believe it was a Smith and Wesson. We found it under the front porch, not very far from the chimney; the chimney was in the middle of the house."

Cornell Thomas testified, in part, to the effect that defendant came to his house about quarter to three in the morning, the following Thursday after the killing. "I asked did they have him accused of killing this man at the filling station and he said 'No,' and we talked on a little more. He asked me did I have any cigarettes and I told him 'No,' and he said he wished he had a cigarette and we sat there and I asked him wasn't he hungry and he said 'Well, he could eat,' and I told my wife to get up and give him something to eat and she gave him something to eat and he said he wished he had some money and we kept talking on—me and him—concerning money—and he asked me would I go to his house and tell his wife to send him some money, and I asked him how much money did he have that he could get, and he said about fifteen dollars, and I finally told him fifteen dollars wouldn't carry him anywhere and he needed more than that if he had it, and he told me to tell them to send him thirty-five dollars. . . . I found some money about five or six hundred yards from the house; it was in a little streak of woods about where an old stump was—looked like it had been dug up and a little sink there and it was buried. I found that little jar there with that money in it. That knife was not

STATE *v.* McRAE.

in the jar when I found it—thirty-five dollars in greenbacks. I can't tell you exactly what denominations it was in—some one dollar bills and five dollar bills and some ten; I can't tell you exactly what shape; I didn't pay that much attention. After I found the jar I left the money in it and gave him the greenbacks; I didn't find any more money anywhere else and he was still at my house when I got back; he said he didn't know where to go. I carried the jar to an old house where we used to live and hid it in some corn and later I told Mr. Jones (the rural policeman) where it was and told him I found it and where I found it and went to the house with him. . . . I guess he was arrested about eight-thirty that same night; I was with him when he was arrested and I was taking him to the State line. . . . I asked him where he had been working since he quit over here and he told me on people's cars about the country. I hadn't seen Dave since the time the man was found dead until he come to my house; the last time I saw him was in the fall. He nor his wife are any kin to me. (Cross-examination.) Yes, sir, when he come to my house and told me who he was I opened the door and he come in and we sat down by the fire and built it up after a while—after my wife give him something to eat, and we talked and I asked if the officers were not hunting him and he said he didn't know anything about the killing; denied knowing a thing about it and said he didn't have anything to do with it. Yes, sir, he stayed there after I told him the officers were hunting him—he was scared; my wife give him something to eat and I told him I couldn't do him any good. I didn't tell him if I was him I would get away while the getting was good; I told him the way it looked to me he was burned up and I couldn't do him any good and then he said he wished he had some money; I didn't tell him I didn't have any money. He told me to go see his wife and get some money. . . . Dave didn't know we were going to meet the officers I didn't tell him where I was going to take him. I told him I was going to carry him across the State line."

It was in evidence that Cornell Thomas obtained the information where the money was hid from defendant's wife, who went with him and pointed out the spot where Thomas found it.

Leon McCormick testified, in part: "I am about 13 years old. On Friday night before Mr. Ellison was found dead on Saturday, I passed the filling station about 7 o'clock and there was nobody there then but Mr. Ellison. I went in and got a package of chewing gum and came right out and went to my cousin's—Huntley Webb's—about a quarter of a mile from Mr. Ellison's and came back by the filling station about eight-thirty—I stayed at my cousin's about an hour and a half—and I didn't stop as I came back by the filling station. It was dark and I

STATE *v.* McRAE.

couldn't see anybody or any light in there. I was walking and in the middle of the road; the road went right by the filling station. There was a light in the filling station when I went by the first time, a lamp."

Josh Norman testified, in part: "I saw the defendant Dave McRae that night; he was at my house when I come from work; I come in about 7:30; it wasn't dark when I come in, it was just sundown, and he was there then and stayed about thirty minutes. . . . I smelled a little mule on him at that time; that is something to put in automobiles—alcohol. I told him I was too tired to go anywhere and he said he was going to step down to Son McRae's—he stayed right below me, in the direction of the filling station, about half the distance from my house to the filling station. I didn't see him any more that night. When he left my house he asked me what time it was and I told him it was seven-thirty; that is when he left; I looked at my watch. He left my house alone."

Albert Hunt testified, in part: "I saw Dave McRae, the defendant, on Friday afternoon before Mr. Ellison's body was found on Saturday; he was just in front of Mr. Ellison's filling station. I was working on the ditch bank and Dave came by where we were working. . . . When he turned around he had a bottle in his pocket but he didn't take it out. It was a pint bottle with a small neck and a brown looking stopper and resembled this bottle. I couldn't see what was in the bottle. This bottle was found in the filling station at the kerosene tank, right by the axe; the axe was sitting up and the bottle sitting right on top of it. I went in the window of the filling station with Mr. Dunlap before the door was open to let Mr. Miller in and this was in the bottom of the bottle when I found it; that is whiskey was in there. Dave McRae was living down at Gum Swamp at this time, about a mile or three-quarters from the filling station. . . . Q. Just state whether this defendant ever made any statement about Mr. Ellison of any sort? A. Yes, sir, one time, me and Dave McRae helped Mr. Norton kill hogs and come to Mr. Ellison's filling station in the evening when we got through and me and Dave went in and he had a fire in the heater and sat down—I sat down and Dave stood up, and the old man was behind the counter fixing his supper and Dave bought a loaf of light-bread and a can of sardines, and said 'Mr. Ellison, give me your can cutter,' and he did it and when he handed it to Dave he says, 'Dave, I want this one back,' and Dave says 'You will get it back,' and he cut the sardines and give it back to him, and Dave come and sat down on the opposite side of the heater from me and Dave asked me did I want a piece of light-bread and he gave me a piece and I says 'Dave, what was that about a can cutter, what was the matter with you and the old man?' and he said the old man accused him of stealing a can cutter Sunday

STATE v. McRAE.

and he never stole it, and I says 'You and the old man are going to keep on until you have trouble,' and Dave says 'I will kill hell out of that old man,' and I says 'That old man will kill you, he will shoot you because he has got a pistol'—they told me he bought a pistol—and Dave says 'I will kill hell out of him and take that pistol,' the old man was sitting behind the counter eating supper and I went on home and left Dave there and Son Revels come in. I think it was Monday after Christmas."

The evidence relative to the testimony on the *voir dire* will not be set forth, but briefly stated in the opinion.

The defendant introduced no testimony, made assignments of error to exceptions above taken, as to the defendant's confession, and other exceptions and assignments of error, and appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Gibson & Gill for defendant.

CLARKSON, J. The only material assignment of error is to whether the confession of defendant was voluntary. This was thoroughly gone into on the *voir dire* by the judge below in the absence of the jury, and the court ruled that it was voluntary. There was evidence to support this ruling and the witnesses, after proper preliminary questions, who heard the confession of defendant, were permitted to testify. In this we can see no error.

In *S. v. Fox*, 197 N. C., at pp. 487-8, we find: "This Court, through Dillard, J., speaking to the subject in *S. v. Sanders*, 84 N. C., at p. 730, said: 'Under the objection made, the admissibility of the confession depended on the facts accompanying it and the legal inference therefrom, the facts being matter for the decision of the judge and conclusive, and the sufficiency or insufficiency thereof to warrant the admission or exclusion of the evidence being matter of law reviewable in this Court. *S. v. Andrew*, Phil. (61 N. C.), 205; *S. v. Whitfield*, 70 N. C., 356. If from the facts the legal inference be that the confession was voluntary, then the evidence was receivable, otherwise, not.' . . . When objection is made, the competency or incompetency must be heard on the *voir dire*. '*Voir dire*—to speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to.' Black's Law Dic., 1212." *S. v. Blake*, 198 N. C., 547.

In *S. v. Moore*, 2 N. C., at p. 484: "A confession extorted and uncorroborated by circumstances, weighs nothing; but a confession whether extorted or not, that relates a number of circumstances which the

STATE v. McRAE.

prisoner could not well be acquainted with but as perpetrator of the crime, all which circumstances are proved by other testimony, to have actually existed, is such testimony as should be left to the consideration of a jury. That is the nature of the confession in the present case; and upon such testimony, if the jury are satisfied with its truth and sufficiency, they may find the prisoner guilty. They should be very cautious however, and examine every circumstance with the most critical nicety before they do so. The jury found him guilty, and he had judgment of death." *S. v. Herring, post, 306.*

The confession, itself, was full and complete as to the actual killing; the motive of the killing; the obtaining of the money. The confession was corroborated as to the hiding of the money and its location, the larger portion of it being buried near the house of the defendant. The axe was found in the store, with which the old man was killed; the time defendant was seen near the store; the bottle of liquor seen in defendant's pocket the evening before, and a similar one found in the store; the burning and hiding of the pistol, and the similarity to one sold the old man, and many other corroborating circumstances which defendant would not have known of unless he was the perpetrator of the crime.

On the *voir dire* it was shown that there were no promises or threats made to the defendant that induced this confession. His wife had told the officers where to find the pistol and that the money that Cornell Thomas had given to the officers was part of the money that her husband had hidden. He (defendant) then said to bring his wife up and let her tell it before him. When his wife came in to defendant's presence in the jail, she was told, "Now Dave wants to talk to you about this matter. Go ahead and tell me what you know about it, if you want to." She started crying and started telling what she had told the officers before and Dave stood there a little and tears commenced running down, and he said "You can take her back." After that, Dave did tell the officers the particulars of the slaying. The conduct of the officers in this case was far short of that discussed in *Ziang Sung Wan v. U. S.*, 266 U. S., 1, and which was condemned in that case. There was certainly, in the instant case, no inducement or threat offered the defendant. There was questioning. The whole matter was heard patiently and carefully by his Honor in the court below, and is spread upon the record here. It is evident, of course, that the discovery by him that his wife had told the officers what he told her induced him to make a clean breast of the whole matter himself. This, however, was not his wife testifying against him. *S. v. Graham*, 194 N. C., 459; *S. v. Burno*, *post*, 267.

TRUCK CORP. v. TRUST CO.

The confession of defendant is corroborated in every particular. The murder was more than ordinarily brutal. An old man living alone, harmless and inoffensive, working for his daily bread, at the advanced age of 81, slain in his home at night and robbed. The defendant lived in Gum Swamp, and his cruel and ruthless conduct stamps him as a product of the jungle. The defendant being tried for his life, was given every right and benefit known to the law. Unusually able lawyers were appointed to defend him. They did everything to see that the defendant had a fair and impartial trial. They appealed to this Court, and presented an able argument in behalf of the defendant. The Court's charge went into every phase of the evidence and applied the law applicable to the facts, and the contentions of defendant were fully given. It is to the credit of our Anglo-Saxon civilization that, under such trying circumstances, orderly procedure was followed, and defendant was given a fair and impartial trial. The record discloses that defendant had every right which anyone, high or low, was entitled to under the law. Orderly government is fundamental and should ever be followed, as in the present case, and the people of Scotland County are to be commended. We find in law

No error.

BROGDEN, J., dissents.

MACK INTERNATIONAL MOTOR TRUCK CORPORATION v. WACHOVIA
BANK AND TRUST COMPANY, EXECUTOR OF J. H. REED; E. H. REED,
AND NORTHERN INSURANCE COMPANY OF NEW YORK.

(Filed 27 January, 1931.)

1. Contracts F a—In this case held: plaintiff in cross-action was not a party to the contract sued on therein, and nonsuit was proper.

Where the purchaser of trucks under a conditional sales contract pays the seller the amount of the insurance premium under an agreement that the seller have the trucks insured against fire for the protection of them both, and the seller procures the policy, and the purchaser delivers one of the trucks, and after his death, his administrator delivers the other to the purchaser's son, and thereafter the trucks are damaged by fire, *Held*: the purchaser's son, not being a party to the contract of sale nor a beneficiary in the insurance policy, has no contractual relationship with either the seller or the insurer, and in an action for the possession of the trucks he may not set up a cross-action against the seller for failure to provide enforceable insurance protection or against the insurer for liability on the policy.

TRUCK CORP. v. TRUST CO.

2. Insurance J a—Where forfeiture is plainly incurred for violation of stipulations of policy nonsuit in action against insurer is proper.

Where the deceased purchaser of two trucks under a conditional sales contract and his administrator had knowledge of the terms and conditions of a policy of fire insurance thereon procured by the seller, and the evidence discloses several breaches of stipulations in the policy by the administrator which, under its terms, would forfeit the policy, and there is no evidence of a waiver of such violations by the insurer, *Held*: in an action by the seller to recover the balance of the purchase price, the cross-action of the administrator against the codefendant insurer for loss sustained by fire is properly nonsuited.

3. Contracts E a—Evidence of breach of agreement to provide insurance protection held sufficient to be submitted to the jury.

Where the purchaser of trucks under conditional sales contract pays the seller the amount of the insurance premium under an agreement that the seller would insure the trucks against loss by fire, and the seller procures the insurance and so notifies the purchaser, disclosing the terms and conditions of the policy, but failing to disclose the name of the insurer, and after the death of the purchaser his administrator advises the seller that it had sold one truck to the purchaser's son, taking a mortgage for the balance of the purchase price, and asks that the seller "fix" the insurance policy to protect its interest, and in reply thereto the seller advises that in case of loss the estate of the purchaser would be paid all surplus after payment of the seller's lien, *Held*: upon the trucks being damaged by fire, evidence that the seller, knowing the terms and conditions of the policy, had failed to fix the policy as requested by the administrator and had failed to disclose the name of the insurer in time for proper proof of loss to be made, rendering the policy void because of violations of stipulations therein, is sufficient evidence to be submitted to the jury on the question of the seller's liability, and the seller's motion as of nonsuit should have been denied.

APPEAL by defendants, Wachovia Bank and Trust Company, executor, and E. H. Reed, from *Oglesby, J.*, at August Term, 1930, of BUNCOMBE.

Affirmed in appeal of E. H. Reed; new trial in appeal of Wachovia Bank and Trust Company, executor.

This action was begun on 28 September, 1928, to recover of the defendant, Wachovia Bank and Trust Company, executor, the balance due on certain notes executed by its testator, J. H. Reed; dated 23 July, 1925, and payable to plaintiff; and, also, to recover possession of two certain trucks each of which was sold by plaintiff to the said J. H. Reed in accordance with the terms of a conditional sale agreement of even date with said notes. Under the terms of said conditional sales agreements, copies of which are attached to the complaint as exhibits, the plaintiff has a lien on each of said trucks for the amount due plaintiff on the purchase price of the same, as evidenced by notes executed by the said J. H. Reed, and referred to in the said conditional sale agree-

TRUCK CORP. v. TRUST CO.

ment. Both said trucks were injured or damaged by fire on 2 July, 1926. The value of both was greatly diminished by the injury and damage, caused by said fire.

In its complaint, plaintiff alleges that at the time it sold said trucks to the said J. H. Reed, it insured the same against loss or damage by fire, in order to protect its pecuniary interest therein; that the balance due plaintiff on the notes sued on in this action is \$3,382.50; and that the insurance company which under its policy was liable to plaintiff for its loss and damage, caused by the fire, has paid or agreed to pay plaintiff, on account of such loss and damage, the sum of \$2,400. Plaintiff offers to credit the amount due on the notes executed by J. H. Reed, deceased, with the said sum of \$2,400, thus leaving the amount for which plaintiff demands judgment in this action, \$1,100.35, including interest to the date of the commencement of the action.

After the action was begun, it was made to appear to the court that the trucks described in the complaint were, at the date of the fire, and are now, in the possession of E. H. Reed, a son of J. H. Reed, deceased; it was thereupon ordered that the said E. H. Reed be made, and he was made a party defendant in the action.

In their answer to the complaint the defendants, Wachovia Bank and Trust Company, executor, and E. H. Reed, allege that at the date of the sale of the trucks described in the complaint to J. H. Reed, the said J. H. Reed, in accordance with the terms of the conditional sales agreements under which the said trucks were sold and delivered to him by the plaintiff, paid to the plaintiff the sum of \$157.45, as a premium for the insurance of each of said trucks against loss or damage by fire, during a period of eighteen months from the date of said sales, in the sum of \$4,900, with the loss, if any, payable to the plaintiff and the said J. H. Reed, as their interest in the trucks, at the date of the loss, might appear; that thereafter, plaintiff advised the said J. H. Reed that it had insured the said trucks against loss or damage by fire, in accordance with its agreement; that plaintiff did not advise the said J. H. Reed, nor has it advised the defendants, since his death, the name of the insurance company from which it had procured such insurance; that after the fire, defendants informed the plaintiff of the loss resulting therefrom, and requested plaintiff to furnish defendants with blanks for making proofs of their loss; and that plaintiff failed and refused to furnish such blanks, and failed and refused to advise defendants the name of the insurance company with which plaintiff had insured said trucks. Defendants further allege in their answer that since the fire, they have been advised, informed and believe that plaintiff insured said trucks with the Northern Insurance Company of New York, and that the said company was liable to defendants for their loss resulting from

TRUCK CORP. *v.* TRUST CO.

the fire. Defendants allege that the amount of their loss, resulting from the fire which injured and damaged said trucks, was \$10,215.62. Defendants demand judgment that they recover of the plaintiff the said sum of \$10,215.62, and such other and further relief as they may be entitled to.

Plaintiff, in its reply to the cross-action of the defendants, denies the allegations upon which defendants demand judgment against the plaintiff, and allege that if plaintiff is liable to defendants on said allegations, its liability is secondary, and that the Northern Insurance Company of New York is primarily liable to defendants for their loss. In accordance with the prayer in plaintiff's reply, it was ordered by the Court that the Northern Insurance Company of New York be made, and it was made a party defendant in this action.

In its answer to the pleadings of the plaintiff and of its codefendants, the said Northern Insurance Company of New York, denied all allegations therein on which either the plaintiff or the said defendants contend that said defendant is liable to plaintiff or said defendants, for any loss which either suffered by reason of the injury or damage to the trucks described in the complaint, caused by fire on 2 July, 1926.

At the trial of this action, judgment was rendered on the answers of the jury to the issues submitted as follows:

"This cause coming on to be heard before his Honor, J. M. Oglesby, judge presiding and holding the courts of the Nineteenth Judicial District, North Carolina, and a jury, at the regular August A.D. 1930 term of the Superior Court of Buncombe County, and being heard, and the defendant, Northern Insurance Company of New York, having made a motion to nonsuit the plaintiff at the conclusion of the evidence in behalf of the plaintiff, and the defendants Wachovia Bank and Trust Company, executor of J. H. Reed, deceased, and E. H. Reed, having made a motion to nonsuit the plaintiff, and the plaintiff, Mack International Motor Truck Corporation, and the defendant, Northern Insurance Company of New York, having each made a motion to nonsuit the cross-action and counterclaim of the defendants, Wachovia Bank and Trust Company, executor of J. H. Reed, deceased, and E. H. Reed, at the conclusion of all the evidence of said defendants, Wachovia Bank and Trust Company, executor of J. H. Reed, deceased, and E. H. Reed, and the court being of the opinion that said motion of nonsuit by plaintiff and defendant insurance company should be allowed, and the jury having answered the issues of record in favor of the plaintiff, Mack International Motor Truck Corporation and against the defendant, Wachovia Bank and Trust Company, executor of J. H. Reed, deceased.

"It is, therefore, ordered and adjudged that the plaintiff, Mack International Motor Truck Corporation, and the defendants, Wachovia Bank

TRUCK CORP. v. TRUST CO.

and Trust Company, executor of J. H. Reed, deceased, and E. H. Reed, be and they are hereby nonsuited as to any and all claims which they or any of them, have in this action against Northern Insurance Company of New York, and that the defendants, Wachovia Bank and Trust Company, executor of J. H. Reed, deceased, and E. H. Reed, be and they are hereby nonsuited as to their cross-action and counterclaim against the plaintiff, Mack International Motor Truck Corporation, and,

"It is further ordered and adjudged that the plaintiff, Mack International Motor Truck Corporation, have and recover of the defendant, Wachovia Bank and Trust Company, executor of J. H. Reed, deceased, the sum of \$3,382.50, the principal sum of said notes, together with interest upon each of said notes from the date of 23 July, 1925, at the rate of six per cent per annum, until paid, less the sum of \$2,400 to be credited upon said notes as of the date of 28 September, 1928, and that said defendants, Wachovia Bank and Trust Company, executor of J. H. Reed, deceased, and E. H. Reed, pay all the costs of this action to be taxed by the clerk."

From said judgment defendants, Wachovia Bank and Trust Company, executor, and E. H. Reed, appealed to the Supreme Court.

J. W. Hanes for plaintiff.

Bernard, Williams & Wright for defendant, Northern Insurance Company of New York.

Bourne, Parker & Jones and Kitchin & Kitchin for defendants, Wachovia Bank and Trust Company, executor, and E. H. Reed.

CONNOR, J. There was no evidence at the trial of this action tending to show any contractual relation between the defendant, E. H. Reed, and the plaintiff, Mack International Motor Truck Corporation, with respect to the notes sued on in this action, or with respect to insurance on the trucks described in the complaint against loss or damage by fire. The only cause of action alleged in the pleadings of the plaintiff, and established by the evidence at the trial, in favor of the plaintiff and against the defendant, E. H. Reed, is for the possession of the trucks, one of which had been delivered to said defendant by his father, J. H. Reed, and the other by the defendant, Wachovia Bank and Trust Company, executor, after the death of the said J. H. Reed. In its letter to the defendant, Wachovia Bank and Trust Company, executor, dated 13 January, 1926, in reply to a letter advising plaintiff that E. H. Reed had the trucks in his possession, and had agreed to assume liability for certain of the notes executed by J. H. Reed, the plaintiff expressly declined to "look to" the said E. H. Reed for the payment of said notes. At no time after the trucks sold by plaintiff to J. H. Reed were delivered

TRUCK CORP. *v.* TRUST CO.

into the possession of E. H. Reed did the plaintiff enter into any contract with the said E. H. Reed, with respect to said trucks, or with respect to insurance on the same.

Nor was there any evidence of any contractual relation between the defendant, E. H. Reed, and his codefendant, Northern Insurance Company of New York, with respect to insurance on said trucks. The defendant, E. H. Reed, is not named as the assured in the policy of insurance offered in evidence at the trial, nor in any rider attached thereto. It does not appear from the evidence that the defendant insurance Company had any notice prior to the fire that the trucks had been delivered to the said E. H. Reed, or that the said E. H. Reed had or claimed any interest in them. In the absence of evidence tending to show that the defendant, Northern Insurance Company, of New York, contracted, directly or indirectly, with the said E. H. Reed, with respect to insurance on the trucks, the latter is not entitled to recover in his cross-action against the said insurance company.

There is no error in the judgment dismissing the cross-action of the defendant E. H. Reed against the plaintiff and also his cross-action against his codefendant, Northern Insurance Company of New York. In this respect the judgment is affirmed.

All the evidence with respect to the cross-action of the defendant, Wachovia Bank and Trust Company, executor, against its codefendant, Northern Insurance Company of New York, on the policy of insurance offered in evidence at the trial of this action, shows that said defendant is barred of any recovery on said policy by reason of the breach of and its failure to comply with certain valid and binding stipulations and provisions of said policy. Both the said defendant and its testator had knowledge of these stipulations and provisions, and with this knowledge both breached and failed to comply with the same. For this reason, by the express terms of the stipulations and provisions of the policy, an action to recover on the policy is barred. The testator of said defendant was advised by his agent, the plaintiff, Mack International Motor Truck Corporation, in its letter dated 23 July, 1925, that it had insured the trucks against loss or damage by fire, under a policy of insurance, "the terms, conditions and limitations of which are printed on the reverse side of this letter for the information of all concerned." There was no evidence tending to show that the defendant insurance company had waived the several breaches by the defendant and its testator of said stipulations and provisions.

There is no error in the judgment dismissing the cross-action of the defendant, Wachovia Bank and Trust Company, executor, against its codefendant, Northern Insurance Company of New York. In this respect the judgment is affirmed.

TRUCK CORP. *v.* TRUST CO.

At the time plaintiff sold the trucks described in the conditional sales agreements attached to the complaint in this action as exhibits, to J. H. Reed, the said J. H. Reed, in accordance with the terms of said conditional sales agreements, paid to the plaintiff, as a premium for the insurance of each of said trucks against loss or damage by fire, the sum of \$157.45. In consideration of the payment of said sum of money, the plaintiff agreed to insure each of said trucks against loss or damage by fire, for a period of eighteen months, in the sum of \$4,900, with the loss, if any, payable to the plaintiff and to the said J. H. Reed, as their interests might appear at the date of loss. There was evidence tending to show that plaintiff insured said trucks in accordance with its agreement, and that it so advised the said J. H. Reed. The plaintiff did not advise the said J. H. Reed, nor did it advise the defendant, Wachovia Bank and Trust Company, executor of the said J. H. Reed, after his death and before the date of the fire which injured and damaged said trucks, the name of the insurance company which had issued the policy of insurance. Plaintiff did, however, advise the said J. H. Reed of the terms, conditions and limitations contained in the policy of insurance which plaintiff had procured. There was evidence tending to show that the said J. H. Reed, and after his death the defendant, his executor, breached and failed to comply with certain stipulations and provisions of said policy. By reason of said breaches of and failure to comply with said stipulations and provisions, by the express terms of the policy, the defendant, Wachovia Bank and Trust Company, executor, is barred of recovery on the said policy, and is also barred of recovery on the contract of plaintiff to insure said trucks, unless the same have been waived by the plaintiff. With respect to such waiver, the facts shown by the evidence are as follows:

After the death of J. H. Reed, and after the defendant had qualified as his executor, to wit, on 11 January, 1926, the defendant advised the plaintiff that it was informed that E. H. Reed, the son of J. H. Reed, claimed that his father had sold or given to him one of the trucks and that he had assumed the payment of the notes of J. H. Reed for the balance due on the purchase price of said truck. In its letter to plaintiff, dated 23 February, 1926, the defendants advised the plaintiff that it had sold the other truck to the said E. H. Reed, and had taken a mortgage on same for the purchase price. In this letter, defendant requested plaintiff to have the policies of insurance on the trucks "fixed so that in case of accident or fire, we will be protected after you have been paid." To this letter plaintiff replied on 27 February, 1926, advising plaintiff that the trucks were insured, and that "in the event of fire, theft or collision on trucks covered with insurance with this company, the claim of the company would, of course, be paid first, and the balance

TRUCK CORP. v. TRUST CO.

would then go to the estate of Mr. J. H. Reed." The trucks were thereafter injured and damaged by fire on 2 July, 1926.

After the fire, to wit, on 3 July, 1926, defendant by letter advised the plaintiff of the loss and requested plaintiff "to send proper papers to be signed in regard to the loss." In response to this letter, plaintiff wrote the defendant on 10 July, 1926, as follows: "With reference to your letter of 3 July, regarding loss by fire of two trucks, Nos. 737906 and 737855, which were operated by the estate of J. H. Reed, deceased. Our insurance adjuster has been advised of this loss, and no doubt will be in Asheville in a short time to make an adjustment." An adjuster soon thereafter investigated the loss. Both the plaintiff and the Northern Insurance Company of New York, from whom plaintiff had procured the policy of insurance on the trucks, subsequently denied liability to the defendant for the loss which it had sustained by the fire. Plaintiff did not inform the defendant that the policy of insurance on the trucks had been issued by the Northern Insurance Company, until after the expiration of the time within which according to the terms of the policy proofs of loss were required to be filed.

On the foregoing facts it was error to nonsuit the defendant, Wachovia Bank and Trust Company, executor, in its cross-action against the plaintiff. The plaintiff with knowledge that the terms of the policy which it had procured for the protection of its interest and of the interest of the defendant in the trucks had been violated by both J. H. Reed and the defendant, his executor, advised the defendant that the trucks were then insured against loss by fire, and that in the event of loss by fire "its claim would be paid first, and that the balance would then go to the estate of Mr. J. H. Reed." This information was given to the defendant after it had requested the plaintiff to have the policies on the trucks "fixed" so that its interest in the trucks would be protected in case of accident or fire. If plaintiff failed to have the policies "fixed" as requested by defendant, and as defendant was, in effect, advised had been done, then plaintiff is liable to defendant for the loss which it has sustained as a result of the fire. *Case v. Ewbanks*, 194 N. C., 775, 140 S. E., 709. The amount of defendant's loss is the value of its interest in the trucks at the date of the fire.

In accordance with this opinion, the judgment is affirmed in the appeal of the defendant, E. H. Reed, and in the appeal of the defendant, Wachovia Bank and Trust Company, executor, except as to the plaintiff.

The judgment that the cross-action of the defendant, Wachovia Bank and Trust Company, executor, against the plaintiff be dismissed as of nonsuit is reversed.

It is ordered that as to the issues determinative of said cross-action there shall be a

New trial.

SOUTHERN v. COTTON MILLS Co.

J. P. SOUTHERN, EMPLOYEE, DECEASED, AND MRS. J. P. SOUTHERN ET AL.,
v. MOREHEAD COTTON MILLS COMPANY, EMPLOYER, AND MARY-
LAND CASUALTY COMPANY, CARRIER.

(Filed 27 January, 1931.)

1. Master and Servant F i—Findings of fact of Industrial Commission are conclusive on courts when supported by sufficient evidence.

The findings of fact of a member of the Industrial Commission in a hearing before him under the Workmen's Compensation Act, approved by the full Commission upon appeal, is conclusive upon the courts when supported by any sufficient evidence.

2. Master and Servant F b—Evidence held to support finding that death resulted from accident arising out of and in course of employment.

Evidence tending to show that an employee of a mill using water power had the duty of keeping the race at the dam on the employer's premises clear of obstructions for the continued or proper running of the machinery of the mill, and that he came to his death in assisting the removal of an automobile from the water during his working hours by being drowned in the fast flowing waters in the race, is sufficient evidence to sustain a finding of the Industrial Commission that his death was caused by an accident arising out of and in the course of his employment and awarding recovery to the claimant under the provisions of the statute.

APPEAL by plaintiffs from *Johnson, Special Judge*, at June Term, 1930, of FORSYTH. Reversed.

The findings of fact, as set forth by J. Dewey Dorsett, Commissioner:

"It is admitted and is a part of this record; and is now found as a fact that the deceased met his death by accidental drowning while regularly employed by the defendant employer; that his average weekly wage amounted to \$22.64 per week, that his wife, Mrs. J. P. Southern, and minor children, Stanford, Elaine and Talmadge Southern, were at the time of J. P. Southern's death and for the three months prior thereto wholly dependent for support upon the deceased.

The owner of the mill has this to say: 'His duties (referring to the deceased) consisted principally of making the rounds, but his duties also consisted of helping raise and lower the gates to the dam, look after the property around there and the tail race.'

Mr. Royster, the superintendent of the defendant employer, has this to say: 'He made the rounds, punched the clock and fired; we were carrying a light fire that night. He looked out for the property all around, and in case anything got in the race it was his duty to get it out, or to get some one else to help him to get it out, and he had charge of the pour, together with the gates and race and anything around there.

SOUTHERN v. COTTON MILLS CO.

If the water got too high and he couldn't raise the gates he would go in the mill and get people to help him or see the night foreman.'

'Q. Where were you at the time this accident occurred? A. I was at supper. My son called me and said the overseer had asked him to call me—that an automobile had run in the pond and that they would have to drain it to get it out, and that we would have to shut down the mill for three nights after that. I jumped in my car and rushed over to the mill.'

The superintendent testified that he thought the deceased was under the impression that the car was full of folks, and further that he did not know that any one had ordered the deceased to jump into the canal for the purpose of rescuing the folks in the car.

Mr. Royster, the superintendent, was asked this question: 'Q. Would you consider his going into the pond to rescue this man in his line of duty? A. The only way I could consider it in that light was that he knew that if something weren't done—if he didn't get the car out it would interfere with the running of the mill; that if the water all run they would have to shut down the mill. I don't know whether he knew we could run without that water, but such was the case. If he didn't, he would do all he could to help the mill folks get started up. We met Mr. Mizelle and told him that the water would have to be drained off, and the only way to do it was by raising the gates and that's what he did. He had all the water cut out. Then they could get the car out before the water was put in again. Mr. Southern was a man that would do anything to keep his job going, and maybe he construed it to be in his line of duty to help get the car out and get the people out. He wanted to keep from having to drain it next day, and get it out so the mill could start up work. He might have construed it in that way.' The superintendent further testified that it was a part of the deceased's duties to keep the pond clean, and was asked this question: 'Q. As a matter of fact, if he had been assisting in getting the automobile out so the gates could be lowered he would have been assisting the company in keeping the water up so the boilers wouldn't run low? A. Yes, sir. Q. The quicker the automobile was gotten out the quicker the gates could be lowered, and it was to the company's interest if he did this so the boilers would not have gotten too low? A. Yes, sir.' Mr. Royster was asked another question: 'Q. If he jumped in, Mr. Royster, in your opinion wasn't it in the discharge of his duties in looking after the company's property, and wasn't he right there at that particular time to see about the water? Didn't he go in there to get the automobile out to enable you to fill the boiler more quickly so the mill could continue running? A. Yes, sir, he could have been of assistance, of course, and the gates could not be dropped until the automobile was gotten out. I

SOUTHERN v. COTTON MILLS CO.

think he was aiming to go over there and help until they found the body and get the automobile out.'

Counsel for the defendants asked this question: 'Q. In your opinion was his primary purpose to save the man or to disregard the man and try to keep the mill going? A. Well, knowing the man as I did—he had a rather nervous disposition, and I think Mr. Southern was highly excitable—he was always a man that was fond of working, and he always wanted to help somebody, and he would go through the mill and see somebody that needed a lift and would help him; he was always a man to give somebody a lift, and I think his whole-soul purpose was to get to the car, and get the car out, and help rescue somebody or ascertain if he could lower the gates. Q. His main purpose was to save a life? A. That's my honest opinion as to why he did that. Q. Would the car in the canal have interfered with the operation of the mill? A. Well, no, provided we didn't let the water out. Q. You were anxious that the car be gotten out? A. I stayed there until midnight to do it. Q. Would you have directed your men to get the car out had you been there? A. Yes, sir, I would have proceeded to have gotten it out as quick as I could so we could let the gates down.'

The superintendent was asked this question: 'Q. Was it in the line of his duty as night watchman; that is, do you consider it a part of his duty to superintend and help get the car out of the canal? A. If there was any trouble, or anything happened down there, he went to the night overseer if it was anything he could not handle. I suppose he was under the impression that they could hold him responsible for the water. Q. As superintendent you were interested in the removal of the car and the parties in the car? A. Yes, sir. Q. Did any of your other employees go into the water to get the car out, that you know of? A. No, sir, we got a garage man to get it out.'

In view of the foregoing we make the further finding of fact that J. P. Southern met with an accident arising out of and in the course of his employment upon the premises of his employer which resulted in his death."

AGREED STATEMENT OF CASE ON APPEAL.

The action was originally commenced before the North Carolina Industrial Commission and arose out of a claim for compensation on account of the death of the said J. P. Southern, who was fatally injured while in the employ of the defendant, Morehead Cotton Mills Company.

The case was first heard before Hon. J. Dewey Dorsett, of the North Carolina Industrial Commission at Wentworth, North Carolina, on 30 October, 1929. Commissioner Dorsett filed an opinion in said case in which he sustained the contentions of the plaintiffs that said

SOUTHERN *v.* COTTON MILLS CO.

accident arose out of and in the course of the employment and made an award in favor of said plaintiffs for compensation at the rate of \$13.58 per week, payable weekly, for a period of 350 weeks; and funeral expenses not to exceed \$200.

On 6 November, 1929, the defendants appealed from the award of Commissioner Dorsett to the full Commission. The case was heard before the full Commission on 19 November, 1929, and thereafter, an opinion for the full Commission was filed by Chairman Matt H. Allen, in which the findings of fact and award of Commissioner Dorsett were adopted and affirmed.

Thereafter on 16 January, 1930, the defendants gave notice of appeal from the aforesaid award of the full Commission to the Superior Court of Rockingham County, and the same was transferred for trial to the Superior Court of Forsyth County, where the same was heard on said appeal before his Honor, T. L. Johnson, at the June Term, 1930, of the Superior Court of Forsyth County. Judge Johnson rendered judgment, denying compensation to plaintiffs, overruling and setting aside the award originally made to them by Commissioner J. Dewey Dorsett and approved by the full Commission, and expressly adjudged that the accident did not arise out of the employment of J. P. Southern.

It is admitted that at the time of his death the deceased was in the employ of the defendant, Morehead Cotton Mills Company, and it is the contention of plaintiffs that the injury resulting in the death of the deceased arose out of and in the course of his employment, while the defendants deny this contention, and contend that such injury did not arise out of the employment of the said J. P. Southern. It is further admitted that the employer and the deceased employee, at said time, were subject to the provisions of the North Carolina Workmen's Compensation Act, and that the average weekly wage of the deceased, at the time of his death, was \$22.64.

To the judgment of Judge T. L. Johnson, setting aside the award made by the Industrial Commission to the plaintiffs, plaintiffs duly excepted, assigned error and appealed to the Supreme Court.

Opinion, in part, of full Commission: "Commissioner Dorsett, upon all of the evidence, reached the conclusion that the accident did arise out of and in the course of the employment, and has sustained this position in an able opinion filed with the Commission. This Commission, after careful consideration of all the evidence and the arguments and briefs of counsel for plaintiff and defendant, hereby agrees to and adopts the findings of fact, award, and opinion made therein, and accepts said findings of fact, award, and opinion as the findings of fact, award and opinion of the full Commission. Matt H. Allen, Chairman."

SOUTHERN v. COTTON MILLS CO.

Stipulation: "It is further agreed that the findings of fact by the Commissioner are in accordance with and are supported by the evidence, except that part of findings of fact reading as follows: 'In view of the foregoing, we make the further finding of fact that J. P. Southern met with an accident arising out of and in the course of his employment upon the premises of his employer, which resulted in his death.'"

Fagge & Walker for plaintiffs.

C. O. McMichael, Sr., for defendants.

CLARKSON, J. The decision of this action is found in advance sheets of opinions in cases heard and determined by the North Carolina Industrial Commission, Vol. 1, No. 5, p. 200. The findings of fact and conclusions of law by J. Dewey Dorsett, Commissioner, are not set forth in the above published opinion.

Sec. 2 (f) of the North Carolina Workmen's Compensation Act reads as follows: "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

In *Johnson v. Hosiery Co.*, 199 N. C., at p. 40, it is said: Sec. 2(b) "undertakes to define the word employment and specifically excludes from the operation of the act 'persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer,' etc. . . . It is further provided in section 60 that the award of the Commission 'shall be conclusive and binding as to all questions of fact.' However, errors of law are reviewable. It is generally held by the courts that the various compensation acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." *Rice v. Panel Co.*, 199 N. C., at p. 157.

The Commissioner, Dorsett, found: "In view of the foregoing we make the further finding of fact that J. P. Southern met with an accident arising out of and in the course of his employment upon the premises of his employer which resulted in his death." The full Commission, upon appeal, sustained this finding of fact.

In the present action there was sufficient evidence to sustain the finding of the Industrial Commission. We think the finding borne out by the weight of authority.

In *Indemnity Co. v. Scott*, 278 S. W., at p. 348 (Texas): "The finding of the court in favor of appellees being general, every issuable fact must be considered found in their favor if there is any evidence to support such a finding. In passing upon the sufficiency of the evidence to

SOUTHERN v. COTTON MILLS CO.

sustain each such finding, we must view the same in the light most favorable thereto, rejecting all evidence favorable to the opposite contention, and considering only the facts and circumstances which tend to sustain such finding." S. C., 298 S. W., 414 (Texas).

In *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill., 31 (120 N. E. Rep., at p. 531): "Our consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award. If the evidence in favor of the applicant sustains the award, the weight of the evidence to the contrary will not be considered by the reviewing court. The determination of the facts upon contradictory evidence by the Industrial Commission is final." *Kuca v. Lehigh Valley Coal Co.*, 110 A. R., 731 (268 Pa., 163); *Chicago Dry Kiln Co. v. Industrial Board*, 276 Ill., 556.

In *Baum v. Ind. Com.*, 288 Ill., 516, 6 A. L. R. Anno., at p. 1247: "While compensation under the statute ordinarily is not recoverable unless the injury arises out of the employment, the cases, almost without exception, hold that an employee does not go outside his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property." *Dondenean v. State Ind. & Acci. Com.*, 119 Ore., 357, 50 A. L. R. (Anno.), p. 1148. "By accident arising out of and in the course of the employment" see definition given in *Conrad v. Foundry Co.*, 198 N. C., 723. *Harden v. Furniture Co.*, 199 N. C., 733; *Phifer v. Dairy*, ante, 65; *Davis v. North State Veneer Corp.*, post, 263.

In the present case there is no dispute that the employee was on duty on the defendant's mill property as night watchman at the time of the accident, and had been for years in the employ of defendant as night-watchman. His conduct just prior to the accident was all in furtherance of his employer's business. It was necessary to safely run the machinery in the mill that the gates be down, but the gates were raised after the man plunged in the race in his machine, and could not be dropped until the automobile was gotten out. Every effort was made to get the automobile out, and a few hours after Southern was drowned it was gotten out so that the mill could run. The conduct of Southern undoubtedly leads to the conclusion that he went in the race to get the automobile out and miscalculated the swiftness of the current. He often cleaned out debris in the race before, and his wife said that he stated on one occasion before, "This is my job getting planks and things out of the race." This faithful employee, in performing a hazardous duty, to protect his employer's property and keep the mill running, lost his life by accidental drowning. It was "an injury by accident and arising out of and in the course of the employment." The Commission so

CHIMNEY ROCK CO. v. LAKE LURE.

found, and there was competent and sufficient evidence to support the finding. The deceased belonged to that noble army of workmen who serve their employers faithfully and not by "eye service," and in attempting to save the property of his employers, accidentally lost his life and left dependent a wife and children. The beneficent purpose of the act was that industry would care for the widow and orphan in such cases as the present.

The case of *Davis v. North State Veneer Corp.*, post, 263, is clearly distinguishable. The judgment of the court below is

Reversed.

CHIMNEY ROCK COMPANY, A CORPORATION, AND FIRST BANK AND TRUST COMPANY, A CORPORATION, v. THE TOWN OF LAKE LURE, A MUNICIPAL CORPORATION.

(Filed 27 January, 1931.)

1. Statutes A c—A statute will not be declared unconstitutional unless it is clearly so.

A statute will not be declared unconstitutional by the courts unless it manifestly violates some constitutional provision, and all doubt will be resolved in favor of its validity.

2. Municipal Corporations A a—Act incorporating the town of Lake Lure held valid although lands incorporated are not contiguous.

Where two land corporations have for their purpose the exploitation of mountain scenery, the interest of each being closely interwoven with the other, the lands of each connected by a scenic highway, there is no constitutional inhibition upon the Legislature from incorporating the lands of both into the limits of one town because there is a small intervening acreage between the lands incorporated, and an act incorporating the two tracts of land is held valid under the peculiar facts of this case although the tracts are not contiguous, and the municipality so created may lawfully exercise the power to tax lands within the limits conferred by its charter.

3. Municipal Corporations A c—Municipal charter may not be collaterally attacked, but in interest of public this case is decided on merits.

While ordinarily the validity of a charter of a municipality cannot be collaterally attacked, the Supreme Court under the facts and circumstances of this case, decides the appeal upon its merits, it being to the public interest, involving the validity of taxes levied and bonds issued by the municipality.

APPEAL by plaintiffs from *Harding, J.*, and a jury, at August Term, 1930, of RUTHERFORD. No error.

CHIMNEY ROCK CO. v. LAKE LURE.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the Chimney Rock Scenic Company the owners of the lands described in paragraph 3 of the complaint at the time of the incorporation of the town of Lake Lure under the acts of 1927, chapter 179, Private Laws of N. C., subject to the deed of trust then recorded to Chimney Rock Trust Company, trustee, securing an indebtedness to the Chimney Rock Company? Answer: Yes.

2. Are the plaintiffs the present owners of the lands described in paragraph 3 of the complaint? Answer: Yes.

3. Are the lands described in paragraph 3 of the complaint included within the corporate limits of the town of Lake Lure by the acts of incorporation referred to in Issue No. 1? Answer: Yes.

4. Is the land described in paragraph 3 of the complaint, as shown on map marked 'Chimney Rock Company's property,' and the adjoining land represented on the map as the 'Town of Lake Lure,' area 185 acres, separated from the rest of the lines and boundaries of the town of Lake Lure, as set out in chapter 179, acts of 1927, by a strip of land not owned by the plaintiff, or Chimney Rock Mountains, Inc., or the Chimney Rock Scenic Company or other parties named in the act and not surrounded by any lands named in the act? Answer: Yes.

5. Is the charter of the town of Lake Lure void in so far as it confers upon the town of Lake Lure the right to tax the property described in paragraph 3 of the complaint? Answer: No.

6. If so, are the plaintiffs estopped to assert such invalidity? Answer:"

The court charged the jury that if it believed the evidence as testified to by the witnesses and the documentary evidence offered, it would be their duty to answer the first, second, third and fourth issues "Yes."

Upon the coming in of the issues, the jury having answered them under the direct instructions of the court—first, second, third and fourth issues "Yes," the court as a matter of law, answered the fifth issue "No." The court is of the opinion that it became unnecessary to answer the sixth issue.

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, W. F. Harding, judge presiding, and a jury, at the August Term, 1930, of this court, and the issues in this cause having been answered as appears in the record: It is hereby considered, ordered and adjudged that the charter of the town of Lake Lure as contained in chapter 179 of the Private Laws of 1927 is valid; that the legal boundaries of said town include the property of the plaintiffs described in paragraph three of the complaint herein, and that the defendant is lawfully entitled to collect taxes thereon; that

CHIMNEY ROCK CO. v. LAKE LURE.

judgment herein be entered in favor of the defendant and that the plaintiffs pay the cost of this action to be taxed by the clerk. It is ordered, however, that upon the filing of a good and sufficient bond by the plaintiffs in the sum of \$4,500, said bond to be approved by the clerk of this court, the defendant be and it hereby is restrained and enjoined from selling the property of the plaintiffs for the payment of taxes until further order of this court."

The plaintiffs made numerous exceptions and assignments of error and to the judgment as signed, and appealed to the Supreme Court.

Quinn, Hamrick & Harris and Ryburn & Hoey for plaintiffs.

M. L. Edwards, John M. Robinson and Hunter M. Jones for defendants.

CLARKSON, J. The evidence was to the effect that the town of Lake Lure was incorporated as a municipal corporation by the General Assembly of North Carolina and its charter is set forth in chapter 179, Private Laws of North Carolina, session 1927, and in accordance with its charter it is exercising municipal functions. In its corporate capacity, under the power conferred upon it by the General Assembly it issued and sold a large amount of bonds in the sum of \$250,000, for the alleged purpose of making municipal improvements. (1) The Chimney Rock Company, a corporation, has a deed of trust on its property, dated 1 March, 1929, duly recorded, and the First Bank and Trust Company of Hendersonville, N. C., a corporation, is trustee for the bond holders, the principal sum of \$77,000 is now outstanding. It is in evidence that Chimney Rock Company owns about 185 acres of land which includes Chimney Rock—spoken of as a natural wonder and located on said property—and there is a scenic road leading to the rock and other improvements. Because of its scenic beauty and natural wonder, the property is operated and exhibited for profit as an amusement enterprise, and that the income amounted to from \$40,000 to \$47,000 a year. (2) It was in evidence that Chimney Rock Mountains, Inc., comprises about 8,000 acres of land, about 1,500 acres of this is covered by the lake. Highway No. 20 runs parallel with the river on the north side of Rocky River part of the way. Leaving the town of Lake Lure and coming towards Chimney Rock one comes down Highway No. 20, which skirts along the lake and then continues along Rocky Broad River some distance to where the toll road branches off from Highway No. 20. That is what is known as the private or toll road, and runs southeast for a little distance, crosses part of what is called the intervening property and runs back on the Chimney Rock Mountain property and then, after making a number of turns, goes on up to Chimney Rock. It is about three miles long and is a toll road. It becomes a toll road a short dis-

CHIMNEY ROCK CO. *v.* LAKE LURE.

tance after reaching the property of the Chimney Rock Company where toll is collected. That is the only road approach to what is known as Chimney Rock, where there is located Cliff Dweller's Inn and some other cottages. It is a scenic spot where a great many tourists go. Lake Lure is also a scenic spot, and the people who visit one of these spots very frequently visit the other, as they are right together. This road was built up to the top of Chimney Rock before 1916. One drives more than two-thirds of the distance of this road on the Chimney Rock Company's property before coming to the toll gate where they collect toll. The road below the toll gate is traveled by the general public. Unless going to Chimney Rock, one does not travel this road much because the rock is at the end of the road.

The rock is about 100 feet across, with an elevation of 300 feet on the steepest side from the top over to the ground. The rock covers something like one-eighth of an acre. A great deal of the land included in the big boundary of Chimney Rock Mountains, Inc., is mountainous land and about 1,500 acres included in the big boundary is covered by the lake.

Under the act incorporating the town of Lake Lure, ratified 7 March, 1927, the boundaries included (1) the land owned by the Chimney Rock Company, a corporation, about 185 acres on which is "Chimney Rock"; (2) the land owned by the Chimney Rock Mountains, Inc., 8,000 acres about 1,500 acres is Lake Lure. Between these two bodies of land above set forth are two small tracts of land of about 75 acres. The space between the two is about 700 feet across this property. The highway along Rocky Broad River connects the two tracts, and a toll road runs up to "Chimney Rock." Both are scenic spots close together connected by an improved road.

The contentions of the parties has narrowed down to the sole question: Has the General Assembly the power to incorporate the town of Lake Lure and include in its boundary the lands above set forth, known as "Chimney Rock" development, comprising about 185 acres? We think so.

It is contended by the plaintiffs that this cannot be done, as the land is not contiguous. Both are valuable for scenic beauty, one "Chimney Rock" from the base 1,000 feet ascent, and the other "Lake Lure," 1,500 acres of land covered by water. Then again the two places are primarily to attract tourists and visitors during the summer period, and are joined together by a splendid scenic highway—the joiner by the highway, as it were, being like the famous North Carolina Siamese twins.

Ordinarily the lands comprising a city or town are contiguous. The joining of these two scenic places into one town, the peculiar topography of the land for scenic devolpment, comprised of "Lake Lure" and "Chim-

CHIMNEY ROCK CO. v. LAKE LURE.

ney Rock," is for legislative discretion, and not for this Court to determine. Policy of legislation is for the people, not courts. *Bond v. Town of Tarboro*, 193 N. C., 248.

"It has been long settled that no court would declare a statute void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. The philosophy of our system of government is based on the consent of the governed, subject to constitutional limitations." *Commissioners v. Assell*, 194 N. C., at p. 419; *Kornegay v. Goldsboro*, 180 N. C., at p. 445; *S. v. Revis*, 193 N. C., 192; *Hinton v. State Treasurer*, 193 N. C., at p. 499; *Briggs v. Raleigh*, 195 N. C., 223.

This is an act of the General Assembly, creating the town of Lake Lure, and there is no constitutional provision prohibiting this to be done.

In *Lutterloh v. Fayetteville*, 149 N. C., at p. 70-71, we find: "Judge Dillon, in his work on Municipal Corporations (4 ed.), sec. 185, cites an array of authorities in support of his texts: 'Not only may the Legislature originally fix the limits of the corporation, but it may, unless specially restrained in the Constitution, annex, or authorize the annexation of, contiguous or other territory' (italics ours), and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or in the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will be subjected to taxation to discharge a preëxisting municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the Legislature to determine.' Such legislative enactments involve no sort of a contract between the General Assembly, on the one part, and the citizens of the locality to be annexed, on the other part."

This "other territory" seems to be modified in the fifth edition of Dillon on Municipal Corporations, sec. 355, note p. 618. But the *Lutterloh* case has long been recognized as authority in this jurisdiction. *Holmes v. Fayetteville*, 197 N. C., 740; *Penland v. Bryson City*, 199 N. C., 140. On the present record, we do not think it should be modified.

In 1 McQuillin Municipal Corp. (2 ed., 1928), part sec. 284, p. 715-16, is the following: "Unless restricted by the Constitution, the Legislature may not only establish the original limits of the municipal corporations, but may alter or change the boundaries at any time by directly annexing or detaching territory contiguous or otherwise, dividing or consolidating corporations, or, it may authorize such changes to be made by general or special law unless forbidden by the Constitution, and this may be done without the consent and even against the protest of the corporation, the local authorities or the inhabitants of the communities

CHIMNEY ROCK CO. v. LAKE LURE.

affected. This is regarded as a purely discretionary legislative prerogative, and unless the obligations of contracts or vested rights of third persons are impaired by such action, in accordance with the well established rule, the judiciary cannot interfere." *Manly v. Raleigh*, 57 N. C., 370; *Grady v. Lenoir County*, 74 N. C., 101.

In *Vestal v. City of Little Rock*, 15 S. E. Rep., at p. 892-3, we find: "To sustain their first ground of reversal, appellants rely on the fact that the city is on one side and a part of the lands included in the order is on the other side of the Arkansas River; but we do not think this fact conclusive that the lands are not contiguous within the meaning of the act. The river is also included in the land annexed, and is therefore not a break to contiguity, nor an inseparable barrier to complete amalgamation of the communities upon its opposite banks. That intervening rivers do not prevent such amalgamation or the consequent building up and maintaining of a compact city is attested by common observation; and the Supreme Court of Ohio, in construing a provision in the same terms as that relied on, contained in a statute upon which our own appears to have been modeled, held that a city might annex territory on the opposite bank of a large river. *Blanchard v. Bissell*, 11 Ohio St., 96. See, also, *Ford v. Incorporated Town of North Des Moines* (Iowa.), 45 N. W. Rep., 1031."

We are not unmindful of the contention of defendants that plaintiffs cannot attack collaterally the charter, but defendants say: "It involves the existence of the defendant as a municipal corporation, and, therefore, involves the question of whether the defendant town is rightfully exercising over the citizens thereof the authority of a municipal corporation, whether it is rightfully collecting taxes from the citizens, and whether it is rightfully conferring upon the citizens municipal benefits. It is, therefore, very important for all concerned that this matter be decided on the merits as early as possible." The matter is of such public importance that we have considered it on its merits.

In *Newton v. Highway Com.*, 194 N. C., at p. 305 (concerning a public matter), citing numerous authorities, it is said: "Therefore, upon the face of the record, we see no reason why the judgment rendered by the judge below should not be approved. This course has been pursued in a number of cases in this State and permissible under our decisions."

Whatever may be the decisions in other states, we cannot overrule the act of the General Assembly under the peculiar facts of this case; the topography of the land involved, and the fact that the purpose of the developments are for tourists, scenic developments, and the joinder of the two for the benefit of both, with an improved highway connecting the two closely together.

It may be noted that since the act was passed the town has been bonded for improvements and the bonds sold.

SMITH v. R. R.

The leading and large owners of stock were financially interested in both corporations that were joined in the legislative enactment that made the town of Lake Lure. These parties were active in getting the charter through the General Assembly, and either participated in or knew of the bond issue. Plaintiffs have brought this action two years after the act was passed, and after the bonds were sold. There are no facts on the record that would justify a court to overthrow this act of the General Assembly. The rule is well settled, "If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Sutton v. Phillips*, 116 N. C., at p. 504. We find in law

No error.

L. E. SMITH, ADMINISTRATOR OF BOYD SMITH v. ATLANTIC AND
YADKIN RAILWAY COMPANY.

(Filed 27 January, 1931.)

1. Railroads D b—Held: driver's negligence not imputed to guest and administrator of guest not barred thereby in action against railroad.

Where the plaintiff's intestate is a guest in an automobile driven by the owner and is killed in a collision with a railroad train at a crossing with the highway, and there is evidence tending to show that the guest had no control or direction over the driver of the car and that both the driver and the defendant's employee running the train were guilty of negligence which acting together proximately caused the injury in suit, the negligence of the driver of the car will not be imputed to the plaintiff's intestate and it is not contributory negligence barring the right of the administrator of the intestate from recovering against the railroad company, and the evidence is properly submitted to the jury on the question of the railroad company's negligence and proximate cause.

2. Highways B k—Guest in automobile is required to use due care for his own safety.

Although a mere guest in an automobile driven by its owner is not ordinarily responsible for the negligence of the owner, he is required to take due care for his own safety, but in a position of sudden peril he is not required to exercise that degree of care required of him in ordinary circumstances, and the circumstances may be considered by the jury in determining his right to recover.

3. Same—Question of whether guest was negligent in failing to warn driver of impending peril held question for jury.

The invitee of the owner and driver of an automobile met his death as the result of a collision of the automobile in which he was riding, with a train at a grade crossing, and upon the trial of the action by his administrator to recover damages for his wrongful death against the railroad company there was evidence tending to show that the

SMITH v. R. R.

accident resulted from the concurring negligence of the driver and the defendant's employees, and that the intestate saw the danger, but did not warn the driver, the driver perceiving the danger at the same time and doing all that he could under the circumstances to avoid the collision, upon this and other evidence *per contra*, *Held*: it was for the jury to determine whether the plaintiff's intestate used due care for his own safety upon the question as to whether the intestate was guilty of contributory negligence barring right of his administrator to recover, the burden of showing contributory negligence being on the defendant.

4. Negligence B d—Where negligence of two parties concurs in proximately causing injury both are liable as joint tort-feasors.

In an action to recover damages for an alleged negligent injury there may be two or more proximate causes of the injury, and where this condition exists and the party injured is free from fault, those responsible for the causes are liable for the entire damages sustained as joint *tort-feasors*, and the negligence of one will not be permitted to exculpate the other, there being no right to contribution between joint *tort-feasors*.

APPEAL by defendant from *McElroy, J.*, at April Term, 1930, of GUILFORD. No error.

This is an action to recover damages for the wrongful death of plaintiff's intestate, who was fatally injured as the result of a collision, at a public crossing in the city of Greensboro, between an automobile in which plaintiff's intestate was riding as a passenger, and an engine and tender owned and operated by the defendant.

The collision occurred at about 9 o'clock p.m., on 5 December, 1928. Plaintiff's intestate died as the result of his injuries about thirty minutes after the collision. This action was begun on 4 February, 1929.

The issues submitted to the jury, involving defendant's liability and the damages sustained by the plaintiff, resulting from the death of his intestate, were answered as follows:

"1. Was plaintiff's intestate killed through the negligence of the defendant, Atlantic and Yadkin Railway Company, as alleged in the complaint? Answer: Yes.

2. Did plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer? Answer: No.

3. What damages, if any, is plaintiff entitled to recover? Answer: \$21,000."

From judgment on the verdict that plaintiff recover of the defendant the sum of \$21,000, and the costs of the action, defendant appealed to the Supreme Court.

Brooks, Parker, Smith & Wharton for plaintiff.

Frank P. Hobgood for defendant.

SMITH v. R. R.

CONNOR, J. It may be conceded, as contended by defendant, that there was evidence at the trial of this action tending to show that the driver of the automobile in which plaintiff's intestate was riding as a passenger when he was injured and killed as the result of its collision with defendant's engine and tender, at a grade crossing in the city of Greensboro, was negligent and that his negligence was a proximate cause of the death of plaintiff's intestate. There was evidence to the contrary. There was evidence, also, tending to show that defendant was negligent, as contended by plaintiff, and that its negligence was, at least, one of the proximate causes of the injuries sustained by plaintiff's intestate, which resulted in his death. There was conflict in the evidence as to whether the driver of the automobile was negligent, and also as to whether the defendant was negligent. Conceding that both were negligent, there was conflict also in the evidence as to whether the negligence of the driver of the automobile or the negligence of the defendant was the sole, proximate cause of the death of plaintiff's intestate, or as to whether the negligence of both concurred as proximate causes of his death.

This evidence was properly submitted to the jury on the first issue. The law, certainly in this jurisdiction, applicable to the facts as the jury might find them from the conflicting evidence pertinent to the first issue, is well settled by authoritative decisions of this Court. It has been frequently stated and applied in cases growing out of collisions, where the plaintiff was a passenger in an automobile and was injured as the result of a collision between the automobile in which he was riding at the time he was injured, and another automobile or a train. Thus in *White v. Realty Co.*, 182 N. C., 536, 109 S. E., 564, it is said:

"Conceding that McQuay, the owner and driver of the Ford machine, was negligent, as it is quite apparent from the evidence that he was, yet this would not shield the defendant from suit, if its negligence was also one of the proximate causes of plaintiff's injuries. *Crampton v. Ivie*, 126 N. C., 894, 36 S. E., 351. There may be two or more proximate causes of an injury; and when this condition exists, and the party injured is free from fault, those responsible for the causes must answer in damages, each being liable for the whole damage, instead of permitting the negligence of one to exonerate the others. This would be so, though the negligence of all concurred and contributed to the injury, because, with us, there is no contribution among joint *tort-feasors*. *Wood v. Public Service Corp.*, 174 N. C., 697, 94 S. E., 459."

Again in *Albritton v. Hill*, 190 N. C., 429, 130 S. E., 5, it is said: "In reference to concurrent negligence, we have held that where two proximate causes contribute to the injury, the defendant is liable if his

SMITH v. R. R.

negligent act brought about one of such causes. *Mangum v. R. R.*, 188 N. C., 689, 125 S. E., 549; *Hinnant v. Power Co.*, 187 N. C., 288, 121 S. E., 540; *White v. Realty Co.*, 182 N. C., 536, 109 S. E., 564; *Wood v. Public Service Corp.*, 174 N. C., 697, 94 S. E., 459; *Horton v. Telephone Co.*, 141 N. C., 455, 54 S. E., 299. We have also held that negligence on the part of the driver of a car will not ordinarily be imputed to another occupant, unless such other occupant is the owner of the car or has some kind of control over the driver. See cases cited in the concurring opinion in *Williams v. R. R.*, 187 N. C., 348, 121 S. E., 608."

In the more recent case of *Earwood v. R. R.*, 192 N. C., 27, 133 S. E., 180, where the judgment in favor of the plaintiff and against the defendant, for damages for the wrongful death of plaintiff's intestate, resulting from a collision between the automobile in which plaintiff's intestate was riding, as a passenger, and defendant's train, at a public crossing, was affirmed on defendant's appeal to this Court, it is said: "Of course, if the negligence of the driver is the sole, only, proximate cause of the injury, the injured party cannot recover." Where, however, as in that case, the negligence of the defendant was the sole, proximate cause of the injury, or such negligence concurred with the negligence of the driver of the automobile, in which plaintiff or his intestate was riding, as a proximate cause of the injury or death, the plaintiff is entitled to recover of the defendant the damages resulting from the injury or death, unless the plaintiff or his intestate by his own negligence, contributed to his injury or death, as the case may be. In the latter case recovery is denied, because the negligence of the plaintiff or of his intestate concurred with and contributed to the injury or death. Upon well settled principles of the common law, which are in force in this State, except where modified or abrogated by statute, the contributory negligence of the plaintiff bars recovery of damages resulting from an injury, although the negligence of the defendant was also a proximate cause of the injury. The trend of legislation and of judicial decisions, however, is not favorable to an extension of the principles on which the doctrine of contributory negligence as a bar to recovery of damages caused by the negligence of the defendant rests. The trend is decidedly to the contrary, especially in actions by employees to recover of employers damages for personal injuries caused by the negligence of the employer. In this State, while the driver of an automobile approaching a public crossing is required by statute in certain instances to stop within a specified distance from the crossing, failure to comply with the statutory requirement cannot be relied on as contributory negligence in an action by the driver to recover damages caused by the negligence of the railroad company. C. S., 2621(48).

There was no error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence

SMITH v. R. R.

in this case, unless, as contended by defendant, upon all the evidence, the burden being on the defendant (C. S., 523) the plaintiff's intestate by his own negligence contributed to his death. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598. The evidence with respect to this aspect of the case tends to show that plaintiff's intestate, Boyd Smith, was riding in the automobile with his brother, Ed Smith, and his cousin, Howard Smith; that Ed Smith was the owner and driver of the automobile, and Boyd Smith and Howard Smith were passengers, all three sitting on the front seat; that when the automobile, proceeding along a public street of the city of Greensboro, was about 125 or 130 feet of the crossing at which the collision occurred, the driver, Ed Smith, slowed down to a speed of eight to ten miles per hour; that after passing another automobile and two pedestrians, the driver increased his speed, and when within 25 or 30 feet of the crossing was driving at a speed of about twenty-five miles per hour. Both Ed Smith, the driver, and Howard Smith, the surviving passenger, testified that they first saw an object on defendant's belt line, which extended from its main line to and over the crossing, when the automobile was about 25 or 30 feet from the crossing. They also testified that it was dark, and that the object appeared to be standing still. It was only after the automobile was within a distance of about 20 or 25 feet of the crossing that these witnesses discovered that the object was moving toward the crossing, and that it was an engine and tender. Neither of these witnesses had heard a signal by bell or whistle of the approach of the engine and tender. Neither saw a flagman at the crossing, warning persons traveling on the street, as required by an ordinance of the city of Greensboro, that an engine was about to enter the crossing. There was evidence tending to show that after Ed Smith, the driver of the automobile, discovered that the object which he had seen was an engine and tender and that it was moving toward the crossing, he did all in his power to avoid the collision. There was no evidence tending to show that Boyd Smith, plaintiff's intestate, who was sitting on the side of the automobile toward which the engine and tender approached the crossing, saw the object or discovered that it was a moving engine and tender before Ed Smith, the driver, or Howard Smith, his fellow-passenger, saw it or discovered that the object was a moving engine and tender. Conceding it was his duty, although merely a passenger in the automobile, with no control over the driver, to keep a reasonable lookout for engines and trains on defendant's track, as the automobile approached the crossing, and to warn the driver of the impending danger of a collision, if it was apparent to him that the driver had not seen the engine and tender or having seen them, did not appreciate the danger of a collision, it cannot be held that all the evidence upon this aspect of the case showed that

SMITH *v.* R. R.

Boyd Smith failed to perform this duty, and that such failure was a proximate cause of the collision resulting in his death. If he saw, or by the exercise of reasonable care, could have seen no more than the driver and his fellow-passenger, who were under a like duty, saw, it was for the jury and not for the court to determine whether or not, under all the circumstances, he contributed to his death by his own negligence. If when he saw, or by the exercise of reasonable care, could have seen that an engine and tender on defendant's track was approaching the crossing, he also saw that the driver had seen the approaching engine and tender, and with full appreciation of the impending danger, was doing all in his power, under the circumstances, to avoid a collision, it was for the jury and not for the court to say whether or not his failure to speak to the driver and warn him of the danger was negligence. It is a matter of common knowledge to those who ride in automobiles—certainly to those who drive them—that “back-seat” driving often confuses a driver, and more often than otherwise, prevents him from avoiding dangers encountered on the road.

We have no doubt that the principle on which the defendant relies on this appeal is sound. A passenger in an automobile who is injured as the result of a collision, caused by the negligence of the driver of another automobile, or of a railroad company, may under some circumstances be barred of recovery, not because the negligence of the driver of the automobile in which he is riding is imputed to him, but because by his own negligence in failing to exercise reasonable care for his own safety he has contributed to his injury.

In *Parker v. R. R.*, 181 N. C., 95, 106 S. E., 755, it is said: “As to the contributory negligence, the burden of which was upon the defendants, the plaintiff was not driving the automobile, but was only a guest or passenger in the car. There is no evidence that she had any control over the movements of the car, and the negligence of the driver of the car, if there was any, cannot be imputed to the passenger. *Duval v. R. R.*, 134 N. C., 331, 46 S. E., 750; *Baker v. R. R.*, 144 N. C., 36, 56 S. E., 553, and citations (Anno. Ed.); *Hunt v. R. R.*, 170 N. C., 442, 87 S. E., 210, which distinguishes *Bagwell v. R. R.*, 167 N. C., 611, 83 S. E., 814, which was relied upon by defendants; *Thompson on Negligence*, sec. 502; 20 R. C. L., *Negligence*, sec. 137; *Herman v. R. I.*, L. R. A., 1915A, 766. In sudden peril or emergencies while the plaintiff was bound to take active measures to preserve herself from impending harm, she was by no means held to the same judgment and activity under all circumstances. The opportunity to think and act must be taken into consideration and although she may not have taken the safest course, or acted with the best judgment or greatest prudence, she can recover for injuries sustained upon showing that she was required

SMITH *v.* R. R.

to act suddenly or in an emergency, without opportunity for deliberation. It has been said that when a choice of evils only is left to a man, he is not to be blamed if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty or danger at the time and compelled to decide hurriedly."

The evidence in this case, pertinent to the second issue involving the defense of contributory negligence, was properly submitted to the jury. Whether or not, under all the circumstances confronting him, as the jury might find from the evidence, plaintiff's intestate was negligent was a question for the jury and not for the court. Defendant's assignment of error based on its exception to the refusal of its motion for judgment as of nonsuit, at the close of all the evidence, cannot be sustained.

We have examined with care the other assignments of error relied upon by defendant on its appeal to this Court. They are based on exceptions to the refusal of the court to instruct the jury in accordance with prayers amply made by the defendant, and on exceptions to certain instructions as given in the charge. None of these assignments of error can be sustained. The charge of the court to the jury was full and correct. The instructions on the issues are fully supported by authoritative decisions of this Court. We find no error in the charge. The judgment is in accord with the verdict and must be affirmed.

The jury has assessed the damages which plaintiff is entitled to recover in this action at a large sum. The evidence shows that plaintiff's intestate, at the date of his death, was a strong, vigorous young man, of good character and fine promise. He was 27 years of age and was employed as an assistant foreman by a bridge construction company. He was earning \$6.50 per day, with good prospects for promotion and increase of wages. Notwithstanding the negligence of his brother, the driver of the automobile, if any, it is manifest that his death was caused by the failure of defendant to obey an ordinance of the city of Greensboro, adopted by its governing body for the express purpose of avoiding collisions between automobiles driven by its citizens and others on its public streets, and shifting engines of railroad companies, at crossings maintained by said companies within the corporate limits of the city. The remedy which the law provides for the wrong done plaintiff's intestate is inadequate; it is, however, the only remedy which the law can give for the wrong. In view of the evidence in this case, and the law of this State applicable to the facts which the evidence tends to show, the defendant, we think, has no just cause to complain of the judgment that plaintiff recover the damages assessed by the jury.

No error.

WELSH v. BROTHERHOOD OF R. R. TRAINMEN.

S. L. WELSH v. BROTHERHOOD OF RAILROAD TRAINMEN.

(Filed 27 January, 1931.)

1. Insurance R a—Disability feature of policy did not cover disability arising from cause sued on in this action.

Where a section of the insurance feature of a benevolent association provides that any holder of its certificate who shall suffer the amputation of one or both hands, one or both feet, or the loss of sight in one or both eyes, or who shall reach the age of seventy shall be considered totally and permanently disabled and be entitled to disability benefits thereunder: *Held*, there is no ambiguity in the language of the section leaving room for construction, and a holder of a certificate may not recover thereunder for disability arising from injury to his spine.

2. Insurance E c—Insurance policy of fraternal order may be reformed for mutual mistake or mistake of one party induced by fraud.

An insurance policy of a fraternal order is subject to reformation by the courts in equity when it is alleged and proved that it failed to express the real agreement of the parties because of mistake common to both parties or mistake of one party induced by the fraud of the other.

3. Same—Rescission and not reformation of policy of fraternal insurance is proper when reformation would result in unjust discrimination.

Rescission rather than reformation of a policy of insurance of a benevolent or fraternal order will be decreed in proper instances when the result of reformation will result in unjust discrimination among its members.

4. Same—Where evidence fails to disclose that alleged misrepresentations were made as inducement or relied on by insured, nonsuit is proper.

Where in an action for reformation of an insurance policy of a fraternal order there is evidence that an officer of the order made a misstatement to a member of the order as to the risks covered by the policy, but there is no evidence that the statement was made as an inducement to the member to take out the policy or that the statement was relied on by the member, with further evidence that the member could have read the policy and was given an opportunity to do so, is *Held*: insufficient for the reformation of the policy to cover a risk it did not assume to cover.

5. Insurance R a—Held: action would not lie to compel payment of disability benefits of fraternal insurance, payment being in discretion of committee.

Where the terms of a policy of insurance issued by a fraternal association obligates to pay a certain amount upon the insured being permanently disabled if injury resulted in certain particular instances; and as to permanent injury otherwise resulting, payment was left to the "benevolence" of its specified committee, the policy specifying that in the event that the application for disability benefits under this section be disallowed by the committee that their action would be final and that no

WELSH v. BROTHERHOOD OF R. R. TRAINMEN.

appeal should lie therefrom, and that in case of action at law the section could be pleaded in bar of recovery, *Held*: upon the committee disallowing an application under the section the claimant may not recover in an action at law on the ground that the action of the committee was arbitrary and unreasonable.

APPEAL by defendant from *Sink*, *Special Judge*, at June Special Term, 1930, of MECKLENBURG. Reversed.

This is an action to recover on a "Beneficiary Certificate," issued by the defendant, a fraternal, beneficiary association, to the plaintiff, a member of said association. The defendant is organized under the name and style of "The Brotherhood of Railroad Trainmen" and consists of one grand lodge and of subordinate lodges, organized under charters issued by the grand lodge. The certificate was issued to the plaintiff, a member of a subordinate lodge, on his application therefor, and is dated 1 August, 1926. It was in full force and effect at the date of the commencement of this action, and at said date plaintiff was entitled to all the benefits of its provisions.

As the holder of said certificate, plaintiff was entitled to participate in the beneficiary fund of the defendant, as provided in its constitution and by-laws. It is provided in the certificate, in effect, that the sum of \$5,000 shall be paid to plaintiff by the defendant, out of said beneficiary fund, in the event of plaintiff's total and permanent disability as defined in section 68 of its constitution; and that in the event of his death, the said sum shall be paid to his wife, if living; otherwise, to his personal representative.

Section 68 of the constitution and by-laws of defendant, which was in force at the date of the certificate, is in words as follows:

"Section 68. Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of one or both eyes, or upon becoming seventy (70) years of age, shall be considered totally and permanently disabled, but not otherwise, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate. A disabled member paid under this section shall automatically become a non-beneficiary member beginning with the month following the month in which his claim was approved, providing he pays dues and assessments that are required from non-beneficiary members."

In addition to the benefits provided for in section 68, which by the terms of said section are a legal liability of defendant, other benefits are provided for by section 70 of defendant's constitution and by-laws. Said section is as follows:

WELSH v. BROTHERHOOD OF R. R. TRAINMEN.

"Section 70. All claims for disability not coming within the provisions of section 68 shall be held to be addressed to the benevolence of the brotherhood, and shall in no case be made the basis of any legal liability on the part of the brotherhood. Every such claim shall be referred to the beneficiary board, composed of the president, assistant to the president, and general secretary and treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancellation of such certificate, provided that the approval of said board shall be required as a condition precedent to the right of any such claimant to benefits hereunder, and it is agreed that this section may be pleaded in bar of any suit or action at law or equity, which may be commenced in any court to enforce the payment of any such claims. No appeal shall be allowed from the action of said board in any case; but the general secretary and treasurer shall report all disapproved claims made under this section to the board of insurance at its next annual meeting for such disposition as such board of insurance shall deem just and proper."

On 17 September, 1928, plaintiff filed his petition addressed to the officers and members of his subordinate lodge, as required by the provisions of defendant's constitution and by-laws, for an allowance of a "benevolent claim" under section 70 of defendant's constitution. This petition was accompanied by a physician's certificate that plaintiff was suffering with "an arthritis of the lumbar spine, which dates from an injury. He is now wearing a spinal support, which I advise he continue to use." This petition with the accompanying physician's certificate, was forwarded to the beneficiary board of defendant, by the subordinate lodge of which plaintiff is a member, with its approval. Thereafter, on 17 December, 1928, plaintiff was advised that his disability claim had been duly considered by the beneficiary board, and disapproved. After considerable correspondence with said board, and personal interviews with its members, plaintiff instituted this action on 5 November, 1929.

In his complaint plaintiff alleges:

"6. That on 15 June, 1928, while said certificate or policy was in full force and effect, the plaintiff, while in the discharge of his duties as a trainman, was knocked from the top of a moving box car; that he fell to the cross-ties with such force and violence as to break and fracture his spine; that as a result thereof the plaintiff has been left permanently injured, crippled and disabled; that he not only suffered the injury to his spine, but as results thereof, he has been affected with arthritis of

WELSH v. BROTHERHOOD OF R. R. TRAINMEN.

the spine, and arthritis of the right hip and sacro-iliac joint; that, as a result of said injuries and afflictions, the plaintiff has been left permanently injured and totally disabled to perform the duties of a railroad trainman, or to do any other work of a physical nature or character."

Plaintiff contends that he is entitled to recover in this action under the provisions of section 68 of the constitution and by-laws of defendant, but that if it shall be held otherwise by the court, that said section should be reformed, on the ground either of mutual mistake of the plaintiff and defendant, or of the mistake of the plaintiff induced by the fraud of defendant, and that he is entitled to recover under the provisions of said section as reformed.

Plaintiff alleges in his complaint that at the time he applied for the beneficiary certificate on which he seeks to recover in this action, "It was positively represented to him by the defendant, its agents, officers, and representatives that if he was totally and permanently disabled from following his occupation, he would unqualifiedly be entitled to five thousand dollars (\$5,000), under and by virtue of the beneficiary certificate"; that plaintiff was induced by this representation to apply for and to accept the certificate issued to him by the defendant, and that if this representation was false, the certificate issued to him should be reformed so that its provisions shall be in accord with said representations.

Plaintiff further alleges in his complaint that the action of the beneficiary board of defendant in disapproving his disability claim under section 70 of the constitution and by-laws of defendant, was arbitrary and unreasonable. He contends that for this reason he is entitled to recover in this action under the provisions of said section 70.

At the trial plaintiff testified that prior to making application for the beneficiary certificate issued to him by the defendant, he talked with B. W. Snyder, who at the time was secretary and treasurer of the subordinate lodge of which plaintiff is a member. He said: "Mr. Snyder told me that he was just back from the national convention of the brotherhood, and that at this convention they had adopted for the benefit of the trainmen a \$5,000 feature which would pay for the loss of a hand, or an eye or both hands above the wrist, or both eyes or both feet above the ankle, or if a person should become permanently and totally disabled from performing the duties of a railroad brakeman. I thought the matter over, and as Mr. Snyder said he was taking out the same policy, and one or two other young men, I figured it was a good thing and that I would need it; and I later applied for the same policy."

Plaintiff further testified that when he received the policy through Mr. Snyder, some time in July or August, 1927, he handed it to his

WELSH v. BROTHERHOOD OF R. R. TRAINMEN.

wife, who put it in a trunk with other valuable papers. Plaintiff did not read the certificate or the constitution and by-laws of defendant, a copy of which was forwarded to him by defendant. Plaintiff had been a member of the defendant brotherhood for many years, and had held other beneficiary certificates issued to him by the defendant. He can read and write. He was injured as alleged in his complaint, and there was evidence tending to show that he has been unable because of said injury to do the work of a trainman. He has worked from time to time as an insurance solicitor and as a salesman.

The testimony of the plaintiff was the only evidence at the trial as to any representation made to him with respect to the certificate, prior to its issuance.

Issues submitted to the jury were answered as set out in the record.

From judgment on the verdict that plaintiff recover of the defendant the sum of \$5,000, with interest, defendant appealed to the Supreme Court.

Chas. W. Bundy, Hunter M. Jones and John M. Robinson for plaintiff.

Cansler & Cansler and D. E. Henderson for defendant.

CONNOR, J. There is no allegation in the complaint in this action, nor was there evidence at the trial tending to show that plaintiff was totally and permanently disabled as defined in section 68 of the constitution and by-laws of defendant. Plaintiff has not suffered an amputation or severance of an entire hand at or above the wrist joint, or an amputation or severance of an entire foot at or above the ankle joint; he has not suffered the loss of sight of one or of both eyes, nor has he arrived at the age of 70 years. He has not become totally and permanently disabled as defined in section 68. Conceding that there was evidence tending to show that he has become totally and permanently disabled from doing the work of a trainman, as the result of falling from the top of a moving box car, as alleged in his complaint, it is manifest that under the terms of the beneficiary certificate issued to him by the defendant, plaintiff cannot recover in this action, unless and until the said certificate and section 68 of the constitution and by-laws of defendant have been reformed, as prayed for by defendant in this action. *Burton v. Ins. Co.*, 198 N. C., 498. The provisions of section 68 are so clear and free from ambiguity, that there is no room for a construction of the language of said section upon which plaintiff would be entitled to recover in this action, upon the facts alleged in the complaint and shown by all the evidence. *Hinton v. Vinson*, 180 N. C., 393, 104 S. E., 897. The vital question, therefore, to be decided on this appeal is whether there was evidence at the trial tending to show mutual mistake of the plaintiff

WELSH v. BROTHERHOOD OF R. R. TRAINMEN.

and defendant, with respect to the terms of the beneficiary certificate issued to plaintiff by defendant, or mistake on the part of the plaintiff, induced by the fraud of the defendant, with respect to said terms.

"It is now settled that a policy of insurance may be reformed upon proper allegations and proof, as much as a deed or any other contract, and that is true even after a loss. But the reformation is subject to the same rules of law as are applicable to all other instruments in writing. It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other." *Britton v. Insurance Co.*, 165 N. C., 149, 80 S. E., 1072. Where, however, as in the instant case, the defendant is a fraternal beneficiary association and a reformation of the policy or certificate, as prayed for by the plaintiff, will result in an unjust discrimination among its members, ordinarily a rescission rather than a reformation should be decreed by the court. *Graham v. Insurance Co.*, 176 N. C., 313, 97 S. E., 6, C. S., 6503.

Conceding, as contended by plaintiff, but not deciding, that the secretary and treasurer of the subordinate lodge of which plaintiff is a member, was the agent of the defendant (C. S., 6457), and that defendant would be bound by representations made by him as such agent to plaintiff, as a prospective applicant for a beneficiary certificate to be issued by defendant to plaintiff, in accordance with its constitution and by-laws, notwithstanding such representations were false or fraudulent, and not authorized by said constitution and by-laws (C. S., 6503), we are of the opinion that there was no evidence of such representations in the instant case. The only evidence offered by plaintiff as to such representations was his testimony, tending to show a conversation which plaintiff had with Mr. Snyder, the secretary and treasurer of his lodge, after the latter's return from a national convention of the defendant. It does not appear that the statement made in this conversation to plaintiff by Mr. Snyder as to the action of the convention was made for the purpose of inducing the plaintiff to apply for a beneficiary certificate, or that plaintiff relied on said statement, when he subsequently applied for the certificate which was issued by defendant.

All the evidence shows that plaintiff can read and write and that he is a man of intelligence and business experience. He had been a member of the defendant brotherhood for many years, and held certificates issued by the defendant.

The evidence fails to show a mistake common to the plaintiff and defendant with respect to the terms of the certificate which was issued by the defendant and accepted by the plaintiff; it also fails to show fraud or inequitable conduct on the part of the defendant, its agents,

STATE v. ALLISON.

officers or representatives, by which plaintiff was induced to apply for and accept the beneficiary certificate, which he now seeks to have reformed. In the absence of such evidence, on the authority of well considered decisions of this Court, plaintiff is not entitled to a reformation of his contract with the defendant. *Burton v. Ins. Co.*, 198 N. C., 498; *Welch v. Ins. Co.*, 196 N. C., 546, 146 S. E., 216; *Graham v. Ins. Co.*, 176 N. C., 313, 97 S. E., 6; *Britton v. Ins. Co.*, 165 N. C., 149, 80 S. E., 1072; *Clements v. Ins. Co.*, 155 N. C., 57, 70 S. E., 1076; *Floars v. Ins. Co.*, 144 N. C., 232, 56 S. E., 915.

Plaintiff has no cause of action against the defendant upon his allegation that the action of the beneficiary board of defendant in disapproving his disability claim under section 70 of the constitution and by-laws of defendant was arbitrary. It is expressly provided in said section that no action shall be maintained on a claim under said section until such claim has been approved by said board. Whether or not a claim addressed to the benevolence of defendant shall be approved, is by the express terms of said section to be determined by said board in the exercise of its discretion. All the evidence tends to show that said board considered said claim and in the exercise of its discretion disapproved the same. Plaintiff by his contract expressly agreed that upon such disapproval, defendant would not be liable to him for his claim for disability under section 70.

There was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit. For this reason the judgment is Reversed.

STATE v. HUGH ALLISON.

(Filed 27 January, 1931.)

1. Criminal Law C a—Party who is present and aids, abets or encourages commission of crime is guilty as a principal.

One who is present and by his presence and conduct aids, abets or encourages another in committing a crime is a principal in the second degree and is equally guilty with the perpetrator, there being no practical difference between principals in the first and second degree, and the law relating to accessories before and after the fact has no application.

2. Same—Evidence in this case held sufficient to convict defendant as a principal in the second degree.

Evidence that the defendant drove the perpetrator of the crime in his car passed the deceased with whom they had both quarreled, and that the perpetrator shot and killed the deceased, and that the defendant and the perpetrator had acted in concert and that both were armed with pistols, and that defendant, as they left the scene of the homicide was

STATE v. ALLISON.

heard to remark "we killed a man and must get away from here": is *held* sufficient to sustain a conviction of the defendant as a principal in the second degree.

3. Homicide G b—Instruction as to burden of proof held not erroneous in this case.

Where there is evidence sufficient to convict the prisoner of the crime of manslaughter as an aider and abettor of the actual perpetrator, and there is evidence that the killing was done with a deadly weapon: *Held*, an instruction is not erroneous which places the burden of proof on the State to show guilt beyond a reasonable doubt and on the defendant to satisfy them with his evidence of matters in mitigation or excuse.

APPEAL by defendant from *Finley, J.*, at February Term, 1930, of HAYWOOD. No error.

Hugh Allison, Wade McDaniel, and Rufus Allison were indicted for the murder of Fred Caldwell. When the case was called the solicitor took a *nol. pros.* with leave as to Wade McDaniel and Rufus Allison and prosecuted the action against Hugh Allison only. The jury returned a verdict of manslaughter, and from the sentence pronounced the defendant appealed upon assigned error.

On 19 October, 1929, the defendant and Wade McDaniel met each other in Waynesville and went in a car to Allison's home, some miles in the country. They returned to Waynesville and McDaniel asked the defendant to take him home. They started on their journey and arrived at C. C. Moody's store and filling station on the Dellwood road, where a community road leading to McDaniel's home leaves the concrete highway. There was evidence that they got some liquor there. Some unpleasant words passed between McDaniel and the deceased, followed by threats and acts of violence in which these two, the deceased, D. L. Caldwell, brother of the deceased, A. B. Caldwell, his father, and Rufus Allison, brother of the defendant, directly or indirectly took part. The defendant and McDaniel returned to and spent an hour in Waynesville, when McDaniel again asked the defendant to drive him home. On their way they went the second time to Moody's store and there the second time they stopped the car. Immediately a conversation arose tending to renew the difficulty. Parties representing each side of the combat used profane and obscene language. There is evidence that the defendant, Wade McDaniel, and the deceased each had a pistol. With respect to some of the subsequent events the testimony is conflicting. The deceased started home, followed by his father and by Charley Caldwell, his cousin. The defendant and Wade McDaniel got in the car, a Ford roadster, the defendant driving, McDaniel in the seat to his right, and Rufus Allison and Jack Jones on the left running board. The car went down the road just behind the deceased, the car and the deceased going in the same direction. Near

STATE v. ALLISON.

Moody's store is a railroad and beyond the railroad is a bridge. After the car had passed over the bridge and had gone about ten steps the deceased was shot and killed. The defendant's version of the homicide was this: "We drove on down to the railroad and Fred was just across the railroad and started across the bridge, and there was a hole on the left side of the bridge; it has been repaired since, and there wasn't room to pass there and I slowed up to give him time to get where the road was wide enough and then we come on; we were going very slow, five or six miles an hour; I didn't want to crowd him. Along where I was at the time the road is about 12 or 14 feet wide. When we got out to where he was and started by him I pulled to the left away from him, and just as we got around he turned around with a pistol in his hand and called us God damned sons of bitches and said to stop, and I stopped, and he come to the car and said he was going to blow both of our God damned hearts out, and I said, 'What do you want to do that for?' and he said, 'I don't give a God damn,' and he stepped back about two steps and said to Wade, 'Are you ready to die?' and then he was shot. His pistol was up like that, pointed toward Wade. Wade shot the pistol. He had his right hand on the door and Fred walked up to the car and cursed us and Wade got his pistol with his left hand from his belt and threw it up on his right arm and shot him with his left hand. I don't know how many times he shot him. All the time that Wade was shooting Fred had his pistol drawed right on him. Wade didn't shoot any after Fred started to fall; the pistol firing was so fast I couldn't tell how many times he shot. I hadn't said anything to Fred except that I didn't want to have any trouble with him. I didn't fire my pistol at Fred Caldwell; it was behind the seat; it is a .32. Up to that time I didn't know Wade had a pistol. I saw it after we went on around toward Lake Junaluska; it looked to be a .38."

Wade McDaniel testified: "There was one seat in the car; it was headed down that road; that is in the direction of my home; it is also the direction of Fred Caldwell's home. Jack Jones and Dock Allison got on the left side; they asked Hugh if he was going up in the Cove and Hugh said yes, and Dock said, 'I am going on home,' and Jack Jones said, 'If you are going I want to ride up there.' Ruf Allison lives with his father, below where I live. We drove on down and hit the bridge and Hugh had slowed up till Fred got across the bridge; there was two bad holes where you crossed the bridge and he had to pull to the right to miss the holes; you would be liable to break a spring, and Hugh slowed up and Fred walked on and after we drove out to dodge the holes Hugh pulled in to the right and then cut to the left and about that time the hind wheels were across the bridge and the right fender was about even with Fred and he wheeled with his gun, jerked it out and

STATE *v.* ALLISON.

said, 'Stop, you God damned sons of bitches, I will kill both of you,' and I said to stop; that he had a gun and would shoot both of us, and Hugh stopped and Fred give about two steps over to the car where we were and he had his gun in his hands, and he said, 'I am going to kill both you God damned sons of bitches,' and Hugh said, 'What are you going to do that for?' and Fred said, 'I don't give a God damn,' and stepped back like that and said, 'Wade, are you ready to die?' And I never give him any answer. I had my right hand lying upon the car door like that, and my gun was here in my belt, and Fred had his gun on us; he had a blue steel gun, and I didn't do a thing but grab my gun and lay it on my arm and I shot till Fred's gun went off of me. When I fired my gun the first time Fred Caldwell's pistol was sticking right in my eye like that. I don't remember how many times I shot; I was so excited I shot till that gun went off of me. When I emptied the gun after the shooting there were four shells shot. The gun would shoot six times. There were two loaded cartridges in the pistol after the shooting; that would make me shoot four times. I shot just as fast as I could. My pistol is a .38 Colts Spain; it was a Spain gun; I reckon it meant it was made in Spain. After I shot four times Fred fell over; his gun went out of my face, and he fell over."

The State's evidence tended to show that the defendant drove the car within three or four feet of the deceased; that the deceased stepped from the road against a wire fence; that when the car stopped Wade McDaniel was nearest the deceased; that four or five shots were fired from the car. A witness said, "At the time of the shooting Fred (the deceased) wasn't doing anything; he just turned around and they shot him; and after the first two shots he flirited around and caught at the fence, and then three other shots fired. I didn't see any gun or rock in his hand and at the time of the shooting; his arms and hands were down that way." There was evidence that his pistol was in his right hip pocket when he fell.

On cross-examination the defendant said: "I am married; I do not own any land; I haven't any money on which my wife and I live. . . . For two or three years I haven't done anything but haul and sell liquor; I got an income from that. I have peddled it in town and all over the county. I don't know that there was an organized ring; there was just me in it. When I was hauling whiskey I always carried a pistol; I don't know why; I just carried it."

Wade McDaniel testified that on the morning after his arrest and imprisonment he told an officer that the defendant shot the deceased, and that he did so because the defendant had fled—because he could save himself by saying that the shots were fired by the defendant who had fled and would not return.

STATE v. ALLISON.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Morgan, Ward & Stamey, John M. Queen and Alley & Alley for defendant.

ADAMS, J. The car that followed the deceased when he started home was occupied by the defendant and Wade McDaniel. It had only one seat. The defendant, who drove the car, sat at the left and McDaniel at the right. Rufus Allison and Jack Jones were on the left running board. The deceased was walking on the right-hand side of the road, and when the parties overtook him he was killed by pistol shots fired from the car.

Both the defendant and McDaniel testified that McDaniel had shot and killed the deceased with a pistol. For this reason the defendant has no just cause of complaint on the ground that the court did not submit to the jury, as a distinct phase of the evidence, the question whether the defendant himself had not fired the fatal shots. His testimony taken with that of other witnesses raised the vital question whether he had aided and abetted McDaniel in the commission of the crime; and upon this theory the case seems to have been tried.

A person concerned in the commission of a felony may be a principal in the first or in the second degree. A principal in the first degree is the person who actually perpetrates the deed, and a principal in the second degree is one who is actually or constructively present when the crime is committed and aids and abets another in its commission. "The law, however, recognizes no difference between the offense of the principal in the first degree and of the principal in the second; both are equally guilty. And so immaterial is the distinction considered in practice, that if a man be indicted as principal in the first degree, proof that he was present aiding and abetting another in committing the offense, although his was not the hand which actually did it, will support the indictment; and, on the other hand, if he be indicted as principal in the second degree, proof that he was not only present, but committed the offense with his own hand, will support the indictment." 1 Archbold's Criminal Prac. and Pleading (13) (14). In *S. v. Whitt*, 113 N. C., 716, the Court quoted from Wharton's Criminal Law (9 ed.), 221, to the effect that "the distinction between principals in the first and second degrees, is a distinction without a difference." In the same case it was held that a principal in the second degree may be convicted even where the principal in the first degree has been acquitted; and in *S. v. Jarrell*, 141 N. C., 722, it is said that one principal may be convicted when the other has not been tried. The law relating to accessories before the fact has no application. *S. v. Jones*, 101 N. C., 719. So

STATE v. ALLISON.

if McDaniel shot and killed the deceased under circumstances that would make him guilty of felonious homicide and the defendant was present encouraging, aiding and abetting the perpetration of the deed, the defendant and McDaniel would be guilty of the same degree of crime. *S. v. Whitson*, 111 N. C., 695. It is manifest that this is what his honor had in mind when he referred to McDaniel's act, if he killed the deceased, as a controlling factor in the trial of the defendant.

A person may aid and abet the commission of a homicide by giving help to the perpetrator; by encouragement in acts or words; by inciting, advising, or counseling the deed; by concert of action; and by other unlawful acts naturally resulting in death. *S. v. Powell*, 168 N. C., 134. Indeed, "Where the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouraging." 1 Wharton's Cr. Law, sec. 211a; *S. v. Jarrell*, *supra*; *S. v. Cloninger*, 149 N. C., 567.

Let us keep in mind the testimony of the defendant, and that of McDaniel, that McDaniel had killed the deceased with a deadly weapon. There is unquestionable evidence that the defendant was present aiding and abetting in the perpetration of the deed—evidence, in fact, that from their first meeting with the deceased they were acting in concert. Each of them was armed with a pistol; at the fatal moment they were together in the car; together they left the scene of the homicide; and in their flight, as a witness for the State testified, the defendant was heard to say in the presence of McDaniel, "We killed a man and must get away from here."

It was under these circumstances that the trial court imposed upon the State the burden of proving beyond a reasonable doubt "that the defendant was aiding and abetting and encouraging by his acts and by his presence and conduct the killing of the deceased on the part of Wade McDaniel," and, in that event, likewise imposed upon the defendant the burden of showing to the satisfaction of the jury such facts and circumstances as would mitigate or excuse the offense committed by the defendant and McDaniel as coprincipals. It will be seen that the instructions which are the subject of the defendant's third, fourth, fifth, sixth and eighth assignments of error, were intended to apply to the latter proposition, and in this view they embody a correct statement of the law.

The defendant was not convicted of murder, but of manslaughter. Under the charge to the jury the verdict is equivalent to a finding that McDaniel's act was manslaughter and that the defendant was guilty in the same degree. We are of opinion that the first and second assignments present no sufficient cause for a new trial. Whether a serious

ROEBUCK *v.* SURETY Co.

question would have been raised if the defendant had been convicted of murder in the first degree is a matter with which we are not concerned.

It may be noted that the instructions referred to in the first and second assignments are predicated upon the finding that the defendant and McDaniel were coprincipals, and not that they acted independently, as was contended in *S. v. Orr*, 175 N. C., 773, and *S. v. Greer*, 162 N. C., 640.

No error.

STATE OF NORTH CAROLINA IN RELATION TO W. A. ROEBUCK AND
HIS GUARDIAN, JAMES S. HARRISON, *v.* NATIONAL SURETY COM-
PANY, A CORPORATION.

(Filed 27 January, 1931.)

1. Appeal and Error J c—Findings of fact supported by evidence are conclusive upon appeal.

Where a jury trial is waived and the court finds the facts by agreement of the parties, his findings, supported by sufficient evidence, are conclusive on appeal.

2. Guardian and Ward C b—Bank acting as guardian breaches duty by intermingling ward's funds with bank deposits.

Where a bank is authorized by its charter to act as guardian it owes the same duty to its ward as an individual would owe to keep the ward's funds separate from other funds of the guardian, and to invest the same as the law applicable to investments requires, and where funds of the ward are accepted by the bank in its banking department and commingled by it with its general deposit funds it violates its fiduciary duties as guardian and is liable to the ward for loss occasioned thereby.

3. Guardian and Ward H a—Surety company giving bond for guardian is held to same liability as individual.

A surety corporation allowed by statute to give guardian bonds, C. S., 339, is held to the same liability on a bond given by it as an individual would be, and is responsible to the ward when the guardian's failure to properly perform his duties causes loss to the ward's estate.

4. Guardian and Ward H b—Surety on bond of bank acting as guardian is liable for loss occasioned by bank intermingling funds.

A bank authorized by its charter to also act as guardian breaches its duty when it commingles its ward's funds with those of its general depositors, and, where after such wrongful act the bank fails, the surety on the guardian's bond is liable for the loss occasioned thereby to the ward's estate. C. S., 2161, 2162.

APPEAL by defendant from *Moore*, *Special Judge*, at June Term, 1930, of MARTIN. Affirmed.

ROEBUCK v. SURETY CO.

In *N. C. Corp. Com. v. Martin County Savings & Trust Co.*, 194 N. C., p. 239, *the facts*: "The National Surety Company filed a petition and motion in the above cause, asking that the receiver of the Martin County Savings and Trust Company be directed to pay in full the claims of certain guardians, receivers and administrators, out of moneys in the hands of the receiver, alleging that said claims were entitled to a preference over general creditors. From an order directing the payment in full of said specified claims in preference to the claims of general creditors, the receiver appeals, assigning error."

In the opinion, at p. 240, it is said: "It is not alleged that the National Surety Company would be liable for the payment of said claims in the event they are not paid by the receiver, and it is observed that the fiduciaries do not join in this request, doubtless for the reason that their interests and the interests of their surety may not in this respect be identical. True, counsel for petitioner and counsel 'for certain of the fiduciary claimants,' not named on the record, join in a single brief, filed in this Court, but we find no order making any of the fiduciary claimants parties of record, nor have they filed any pleading in the cause. Furthermore, it is not alleged that the receiver will be unable to pay all the creditors in full, though this may be taken for granted, perhaps. At any rate, for lack of proper parties and sufficient interest shown upon the record, we think the court erred in directing preferential payment of these claims. For like reason, we do not pass upon the merits of the question. The receiver was properly advised in appealing from the order."

The present action was instituted 21 August, 1930. The defendant surety in its answer said: "That the said funds were deposited in the said bank at the time of said failure, but denies that the said guardian was negligent, and that it did not use due care as to said funds, but alleges that it acted with care and prudence required by law." . . . Further: "And receiving notice from some of the parties that it would be called upon to make payment under the bonds given by it, in behalf of the Martin County Savings and Trust Company covering these interests, it notified the parties concerned that it would disclaim liability on account of the fact that the Martin County Savings and Trust Company had not been guilty of negligence by which there would be liability on its bondsmen, and further that the receiver of the said Martin County Savings and Trust Company was liable for the claims in full, which this defendant is informed and believes constitutes a preference. . . . That this defendant is informed and believes that these claims, including that of this plaintiff, constitutes preferred claims and that the said R. L. Coburn, receiver of the Martin County Savings and Trust Company, is liable for the payment in full."

ROEBUCK *v.* SURETY CO.

The plaintiff in reply says: "It is denied that this claim against the defendant is a preferred claim against the receiver."

R. L. Coburn, receiver of the Martin County Savings and Trust Company, having been made a party to this action, answering, says: "It is expressly denied that said guardian was negligent and that it did not use due care relative to the fund complained of, and on the other hand, this defendant alleges that it used due care and prudence with the funds entrusted to it. . . . That the subject-matter of this action, to wit: The fund claimed by the plaintiff was deposited in the Martin County Savings and Trust Company by said guardian in the usual course of business, and that said guardian fund was intermingled with other funds of said bank and that said fund was deposited without any agreement that it was to be a special deposit and the said bank had no intimation that the funds so deposited was a special deposit, and that in truth and in fact said fund was deposited as other funds and used by the bank in the usual course of business as funds deposited by other depositors, and as this defendant is advised and believes, the plaintiff is not entitled to any preference over the general creditors of said bank."

The judgment of the court below is as follows:

"This cause coming on to be heard, the same having been calendared for trial at this term, both plaintiffs and defendants being represented by counsel and present, the parties having waived a jury trial and agreed for the court to find the facts and the court, after hearing the evidence and argument, finds the following facts:

1. That the Martin County Savings and Trust Company prior to its failure and appointment as receiver, was duly appointed and qualified and acting guardian of W. A. Roebuck, a minor.

2. That the defendant, National Surety Company, a corporation, for the faithful performance of the duties of the said guardian, executed a bond in the sum of \$2,000, said bond being in the form as the statute requires, which was executed and on file in the clerk's office at the time of the appointment of the aforesaid guardian.

3. That there came into the hands of the guardian for its ward the sum of one thousand nineteen and 47/100 dollars (\$1,019.47), as shown by the final count, which appears of record in the clerk's office, which was duly audited and approved by the clerk Superior Court; that at the time that said guardian was seized of said funds, it deposited same in the Martin County Savings and Trust Company, to the credit of Martin County Savings and Trust Company, guardian of W. A. Roebuck, and was intermingled with other funds of said bank, and that said funds were deposited in the said bank, in the usual manner and custom to the checking account of said guardian, and were deposited in the absence of any agreement; that same was to be a special deposit, and said guardian did not loan said funds on any security.

ROEBUCK *v.* SURETY CO.

4. That on the failure of said bank, said funds were still on deposit to credit of said guardian.

5. That plaintiff, James S. Harrison, since the failure of said bank, which was on 28 February, 1925, has been duly appointed, qualified and is now the acting guardian of W. A. Roebuck.

6. That since the institution of this action the receiver of said bank has paid 25 per cent dividend and the plaintiff guardian has received a twenty-five per cent (25%) of the one thousand nineteen and 47/100 dollars (\$1,019.47), leaving a balance due of seven hundred and sixty-four and 60/100 dollars.

7. That the said bank was authorized by its charter to become guardian for minors, and act in the capacity of guardian.

Now, on motion, upon the aforesaid agreed statement of facts, the judge decrees and orders that the plaintiff recover of the National Surety Company, a corporation, the sum of \$764.60, together with interest thereon from 28 February, 1925, and that the cost of this action be taxed against defendant, National Surety Company.

It is further ordered, adjudged and decreed that the defendant, National Surety Company, be subrogated to the rights of the plaintiff, and they are hereby, allowed and permitted to file with R. L. Coburn, receiver, the amount of this judgment, including interest, so that they may receive any dividend on said amount that the said receiver may pay in the future to creditors."

B. A. Critcher for plaintiff.

A. R. Dunning for R. L. Coburn, receiver.

S. Brown Shepherd, James E. Shepherd and Hugh G. Horton for National Surety Company.

CLARKSON, J. The judgment of the court below shows: "Both plaintiffs and defendants being represented by counsel and present, the parties having waived a jury trial and agreed for the court to find the facts and the court, after hearing the evidence and arguments, finds the following facts."

In *Colvard v. Dicus*, 198 N. C., at p. 271, this Court said: "A jury trial was waived and the trial judge found the facts and entered judgment thereon. There was evidence to support the findings of fact, and the facts found support the judgment. In such event the findings of fact and the judgment thereon are conclusive. *Eley v. R. R.*, 165 N. C., 78; *Holmes Electric Co. v. Carolina Power and Light Co.*, 197 N. C., 766."

The findings of fact material for the decision of this action: "That the said bank was authorized by its charter to become guardian for

ROEBUCK v. SURETY CO.

minors, and act in the capacity of guardian. That there came into the hands of the guardian for its ward the sum of one thousand nineteen and 47/100 dollars (\$1,019.47), as shown by the final count, which appears of record in the clerk's office, which was duly audited and approved by the clerk Superior Court; that at the time that said guardian was seized of said funds, it deposited same in the Martin County Savings and Trust Company, to the credit of Martin County Savings and Trust Company, guardian of W. A. Roebuck, *and was intermingled with other funds of said bank, and that said funds were deposited in the said bank, in the usual manner and custom to the checking account of said guardian, and were deposited in the absence of any agreement; that same was to be a special deposit, and said guardian did not loan said funds on any security.*"

We must bear in mind that the Martin County Savings and Trust Company was doing a banking business and also under its charter acting as guardian of W. A. Roebuck. It took the guardian funds and intermingled them with the bank funds; it had no more right to do this than an individual.

In Tiffany's Persons and Domestic Relations (2 ed.), p. 343, we find: "So long as the ward's property can be identified in the hands of the guardian in whatever form it may take the ward is entitled to recover it as against the guardian's creditors in case of his insolvency or bankruptcy. Thus where a guardian invested his ward's funds in a promissory note payable to his own order and died insolvent, it was held that the ward was entitled to recover the full amount of the note from the estate. But, if the property of the ward is mingled with that of the guardian in such a way that its identity is lost, the ward has no rights superior to those of general creditors." *Wood v. Bank*, 199 N. C., 371.

In *Sheets v. Tobacco Co.*, 195 N. C., at p. 153, is the following: "For any loss or losses sustained by his ward's estate, by reason of investments made of guardian funds by the guardian, resulting from a breach of his duty with respect to such investments, the guardian and the sureties on his bond are liable. Inasmuch as the law imposes upon a guardian the duty to invest funds in his hands, belonging to his ward, it must follow that the guardian has power and authority, with respect to making investments, commensurate with his duty. In the exercise of this power and authority, conferred upon him in order that he may perform his duty, the guardian is and should be held to a high degree of diligence and good faith. In *Cobb v. Fountain*, 187 N. C., 335, it is said: 'As a general rule, a guardian may discharge himself at the termination of his trust by turning over to the person lawfully entitled thereto whatever securities he may have taken in good faith as a result of the prudent management of his ward's estate.'"

ROEBUCK v. SURETY CO.

In *Pierce v. Pierce*, 197 N. C., 348, the principle is laid down: The liability of a guardian and the surety on his bond for a loss to the estate of the ward caused by the failure of a bank in which the guardian kept deposits of the estate, does not attach when it is found that the guardian exercised good faith and due diligence, and the refusal of the trial court to substantially submit this issue to the jury under the evidence in this case is reversible error.

The funds were not invested by the guardian, but intermingled with the other funds of the bank; nor was there any agreement that the same was a special deposit made by the guardian or deposit for a special purpose. The principle applicable here is laid down in *Hawes v. Blackwell*, 107 N. C., at p. 199-200, it is there said: "When a bank, in the course of its business, receives deposits of money *in the absence of any agreement to the contrary* (italics ours), the money deposited with it at once becomes that of the bank, part of its general funds, and can be used by it for any purpose, just as it uses, or may use, its moneys otherwise acquired. The depositor, when, and as soon as he so makes a deposit, becomes a creditor of the bank, and the latter becomes his debtor for the amount of money deposited, agreeing to discharge the debt so created by honoring and paying the checks or orders the depositor may, from time to time, draw upon it, when presented, not exceeding the amount deposited. The relation of the bank and depositor is simply that of debtor and creditor, the debt to be discharged punctually in the way just indicated. The contract between them, whether express or implied, is legal in its nature, and there is no element of quality in it different from the same in ordinary agreements or promises, founded upon a valuable consideration to pay a sum of money, specified or implied, to another party. There are none of the elements of a trust in it. The bank does not assume or become a fiduciary as to the money deposited for the depositor, nor does it agree to hold a like sum in trust for him. *Boyden v. Bank*, 65 N. C., 13; *Bank v. Millard*, 10 Wall., 152; *Bank v. Schuler*, 120 U. S. R., 511." *Corp. Com. v. Trust Co.*, 194 N. C., at pp. 127-8. See *Ex parte Hemlen*, 156 S. C., 181, 69 A. L. R., 443.

Guardians are required to give bond with certain terms and conditions. C. S., 2161, 2162. A guardian bond can be given in a surety company. C. S., 339. It goes without saying that the surety company is held to the same accountability as an individual who is surety. An individual who acts as guardian cannot fraudulently or knowingly and wilfully misapply or convert money of his ward to his own use, nor can a corporation that has a right under its charter to act as guardian do so. C. S., 4268. Under the facts and circumstances of this case, the bank, acting as guardian had a right to invest its ward's money, but in

ORANGE COUNTY v. JENKINS.

so doing is held "to a high degree of diligence and good faith." It did not invest the money of its ward, but intermingled it with other funds in its bank.

C. S., 2162, in part: "The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him."

The bank, as guardian, in not investing the funds of its ward, but intermingling it with other funds of its bank, was faithless to the trust reposed in it; and its bondsman, the defendant, must suffer the loss for such faithlessness.

For the reasons given, the judgment of the court below is Affirmed.

ORANGE COUNTY v. ANDREW JENKINS AND WIFE AND C. P. HINSHAW.

(Filed 27 January, 1931.)

1. Taxation H a—Purchaser at tax sale acquires remedy of foreclosure of tax certificate according to statutory procedure.

Where the purchaser at a sale of lands for taxes, the county in this case, has received a tax sale certificate therefor, he has acquired an interest in or a lien upon the land so purchased with the only remedy of foreclosure by action as in case of a mortgage.

2. Taxation H b—Statutory notice of foreclosure of tax certificates held constitutional and valid.

The State as a sovereign power has the right to prescribe by statute the notice to be given to those interested in lands to be foreclosed under tax sale certificates except where the manner of notice interferes with the provisions of the Federal Constitution, and a statutory provision that substitutes notice by publication to be given in the newspapers as in an action *in rem* does not violate the "due process" clause of the Federal Constitution, and the purchaser at the judicial foreclosure sale, when fairly made in conformity with our statutory provisions acquires title free from the claims of those who may have an interest in the *locus in quo* who do not appear and defend their rights. C. S., 8037; Michie Supplement of 1929, Laws of 1927, ch. 221, Laws of 1929, chs. 204, 334.

3. Appearance A a—Party submitting himself to jurisdiction of court by filing answer is bound by court's decree.

Where the summons against the owners of land has been returned "not to be found" in a proceeding to foreclose tax sale certificates against the land, and the owners have thereafter appeared and submitted themselves to the jurisdiction of the court by answering or otherwise, they

ORANGE COUNTY v. JENKINS.

are bound by the decree of foreclosure and by the final adjudication regularly arrived at in the course of the procedure under the provisions of the statute.

4. Taxation H b—Foreclosure of tax certificate is proceeding in rem and attachment is not necessary to service by publication.

In proceedings to foreclose lands under the provisions of statute to subject them to the lien of a tax sale, it is not required that the courts should have obtained possession of the *locus in quo* by attachment or actual seizure of the property.

5. Same—Affidavit under provisions of C. S., 484, is not required in proceedings to foreclose tax sale certificate.

Where the summons in proceedings to foreclose a tax certificate of the sale of lands in the action against the listed owner of the lands has been returned the defendant "not to be found," it is not required as under the provisions of C. S., 484, that this fact be made to appear by affidavit to the satisfaction of the court in order for valid service by publication.

6. Same—Statutory procedure for foreclosure of tax certificate does not violate constitutional provisions relating to due process.

The State may proceed directly or by authorization to others to sell lands for taxes upon proceedings to enforce a lien for the taxes thereon, and a publication of notice to all interested in the lands to appear and defend their rights is due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution, and is not a taking of property inhibited by Art. I, sec. 17, of the Constitution of North Carolina.

APPEAL by C. P. Hinshaw from a judgment of *Grady, J.*, rendered 26 September, 1930. From ORANGE.

The respondent, Andrew Jenkins, owner of the land in controversy, failed to pay the taxes assessed against it for the years 1926 and 1927, in consequence of which the land was sold by the sheriff of Orange County on 19 September, 1927. The county became the last and highest bidder and received from the sheriff and became the holder of two certificates of purchase which were filed in the office of the county accountant. The certificates were foreclosed and a commissioner was appointed to sell the land; the sale was confirmed and a proceeding was instituted to compel the purchaser to accept the commissioner's deed and pay the purchase price. The agreed facts are as follows:

The said action was instituted by the plaintiff against the defendants under the provisions of C. S., 8028, 8035-8037, as amended by Laws of 1929, chs. 204, 334, for the foreclosure of the 1927 and 1926 tax sales certificates. The defendants in said action failed to file answer to the complaint and summons within the time allowed by law, and judgment by default was given against the said defendants in said action. R. T. Giles was appointed by the court as commissioner to sell the property involved therein, and in pursuance of said order and judgment, said

ORANGE COUNTY v. JENKINS.

R. T. Giles, commissioner, did advertise said property for sale as required by law, and offered said property for sale on 12 March, 1930, at the courthouse door in Hillsboro, N. C., and at said sale C. P. Hinshaw became the last and highest bidder for the same in the sum of \$125. No exceptions were filed or raised bid made in the time required by law. The sale was duly reported to the clerk of the Superior Court by said commissioner, and in pursuance of said report the said clerk on 2 April, 1930, approved and confirmed said sale and authorized and instructed the said commissioner, upon payment of the purchase price, to make and deliver a deed in fee simple for the said property to the said C. P. Hinshaw. In pursuance of said order, said R. T. Giles, commissioner, made and executed in proper form, a commissioner's deed for the said land to the said C. P. Hinshaw and tendered the same to him; but the said Hinshaw refused to accept said deed and refused and still refuses to make payment of the purchase price of \$125 for said land, for the reasons set out in answer to the motion of the plaintiff for judgment against the respondent.

Taxes upon said property for the years 1926, 1927, 1928 and 1929, levied and assessed by the town of Chapel Hill, N. C., in the amount of \$90.00, are due and unpaid. The proceeds to be derived from the sale of the said property, namely, \$125, are not sufficient to pay off the above-mentioned taxes, after paying off the unpaid county taxes assessed upon said property, and the costs of said action.

Ten days notice of this motion has been duly served on the respondent."

The reasons set out in Hinshaw's answer to the plaintiff's motion are these:

1. That C. S., 8028, 8035-8037, as amended by Laws of 1929, chs. 204, 334, under which said action was instituted, is unconstitutional, and no valid or marketable title in fee simple can be conveyed thereunder.

2. That service of summons was had upon the said defendants in said action by publication, for which reason the title if conveyed to the respondent may be attacked by the said defendants in the said action at any time within one year after notice thereof, and within five years after rendition of the judgment in said action, same being by virtue of the provisions of C. S., 492.

3. That the proceeds to be derived from the sale of the said property, namely, \$125, is sufficient only to pay off the unpaid county taxes assessed upon said property after the court costs of said action have been paid; that the town of Chapel Hill, N. C., has levied and assessed taxes upon the said land for the years 1926, 1927, 1928 and 1929, which said taxes are still due and owing; that due to the fact that the

ORANGE COUNTY v. JENKINS.

said commissioner will receive insufficient funds from the sale of the said property to pay off and satisfy the unpaid taxes due upon said property to the town of Chapel Hill, as hereinbefore set out, said town taxes will remain and constitute a lien upon said property in the hands of the respondent.

Upon the agreed facts the clerk gave judgment for the plaintiff and upon Hinshaw's appeal Judge Grady signed the following judgment:

"This cause came on for hearing upon an appeal from A. W. Kenion, clerk of the Superior Court of Orange County, and the parties having filed with the court an agreed statement of the facts, which is made a part of this judgment, and in addition thereto, it having been admitted in open court that due notice was given by publication commanding all persons having any interest in the lands referred to in the complaint to come in and take such action as they might be advised, and it appearing to the court, and being admitted by all parties, that the sale of said lands was conducted in all respects in conformity with the laws relating to sales of land for taxes, and that each and everything has been done that is required by said statutes in order to give to the purchaser a good and indefeasible title to said lands; and the court being called upon to pass upon the constitutionality of said statutes, and no other defense being interposed, it is now:

Ordered and adjudged that the commissioner, R. T. Giles, prepare and tender to said C. P. Hinshaw, the purchaser of the lands in question, a good deed for said lands, in the form required by law; and it is also ordered that the said C. P. Hinshaw pay to said commissioner upon the tender of said deed the sum of \$125, and the costs of this action, the court being of the opinion, and now adjudging that said deed will convey to the said C. P. Hinshaw an estate of inheritance in and to the lands referred to in the complaint, freed from any lien that may have heretofore existed in favor of the town of Chapel Hill by reason of the tax assessment referred to in the respondent's answer to the notice filed therein. -

The costs of this proceeding will be taxed against the said respondent, C. P. Hinshaw, as to all expenditures made since the final judgment and decree of confirmation by the clerk of the Superior Court."

The respondent Hinshaw excepted and appealed.

J. R. Carawan for appellant.

R. T. Giles for appellee.

ADAMS, J. The judgment recites an admission by all the parties that the sale of the land in controversy was conducted in compliance

ORANGE COUNTY v. JENKINS.

with law and that everything was done which the statutes require in order to convey to the purchaser an indefeasible title. The only question for decision is whether the statutes under which the sale was conducted are in conflict with the State or Federal Constitution. This question the trial court resolved against the appellant.

It is contended that these statutes violate Article I, sec. 17, of the Constitution of North Carolina, and Article XIV, sec. 1, of the Constitution of the United States. The specific objections are (1) that the taxpayer is deprived of his property without due process of law; (2) that the law does not apply with uniformity to all persons or property, and (3) that it does not provide adequate notice to lienholders or other persons having an interest in the property.

Under section 8037, Michie's Supplement of 1929 (Laws 1927, ch. 221, sec. 4; 1929, chs. 204 and 334) the county of Orange instituted a proceeding to foreclose two sheriff's certificates of sale for taxes. As the holder of these certificates the county had a lien on the land as in case of a mortgage, and the right of foreclosure was its only remedy. N. C. Code of 1927, sec. 8028; Laws 1927, ch. 221, sec. 4; Supplement of 1929, sec. 8037. Relief could be had "only in an action in the nature of an action to foreclose a mortgage." It is provided that the person in whose name the land was listed for taxation and the wife or husband of such person shall be made defendants and shall be served with process as in civil actions.

A summons was issued for Andrew Jenkins and his wife and was returned without service because they "were not to be found in Orange County." Thereafter they were duly and regularly served by publication. By filing a written answer to the plaintiff's motion Hinshaw submitted himself to the jurisdiction of the court.

The "due-process" clause of the Federal Constitution requires service of process, which may be made by actual service, or by publication in proceedings *in rem*, or by publication in proceedings *quasi in rem*. In proceedings *in rem* instituted, for example, to enforce a lien upon property, it is not necessary, as in proceedings *quasi in rem*, to acquire jurisdiction by attachment or actual seizure of the property. *Bernhardt v. Brown*, 118 N. C., 700; *Armstrong v. Kinsell*, 164 N. C., 125; *Heidritter v. Oil Cloth Co.*, 112 U. S., 294, 28 L. Ed., 729. In *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 565, Mr. Justice Field set forth the principle in these words: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that the seizure will inform him, not

ORANGE COUNTY v. JENKINS.

only that it is taken into custody of the court, but that he must look to any proceedings authorized by law upon such seizure for the condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or where the public is a party to condemn and appropriate it for a public purpose." Such service is not subversive of the due-process clause. *Bynum v. Bynum*, 179 N. C., 14; *Foster v. Allison Corporation*, 191 N. C., 166.

The principle just stated applies to that part of section 8037 which provides for an advertisement "giving notice to all other persons claiming any interest in the subject-matter of the action to appear, present, and defend their respective claims, and to set them up within six months from the date of the notice" or be forever barred and foreclosed of any interest or claim in the property or the proceeds received from its sale. Service of notice by publication on interested parties in a proceeding *in rem*, when authorized by statute, is no less effective for the purpose intended than substituted service of process on the defendant in the action. As remarked by Cooley, "The right of the Legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has long been recognized and acted upon." Constitutional Limitations, 505. If the person on whom a summons is to be served cannot after due diligence be found in the State, that fact must appear by affidavit to the satisfaction of the court (C. S., 484); but if a proceeding is instituted to foreclose a tax lien on property, unknown persons who claim an interest in the subject-matter may be notified by publication to appear and assert their interest. The "necessity of the case" is found in the fact that the plaintiff does not know whether there are outstanding claims and, if so, whether the claimants reside within or without the State. The expressed purpose of the statute is to convey the land in fee simple free from all claims whether disclosed by the records or not.

The principle was discussed and applied in *Leigh v. Green*, 193 U. S., 79, 48 L. Ed., 623, in which it is said: "The State has a right to adopt its own method of collecting its taxes, which can only be interfered with by Federal authority when necessary for the protection of rights guaranteed by the Federal Constitution. In authorizing the proceedings to enforce the payment of taxes upon lands sold to a purchaser at a tax sale, the State is in the exercise of its sovereign power to raise revenue essential to carry on the affairs of state and the due administration of the laws. This fact should not be overlooked in determining the nature and extent of the powers to be exercised. 'The process of taxation does not require the same kind of notice as is re-

CROWELL v. POWER CO.

quired in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them.'"

Mr. Justice Day concludes the opinion in these words: "The principles applicable which may be deduced from the authorities we think lead to this result: Where the State seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are "so minded," to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment to the Constitution."

The other questions discussed in the briefs do not affect the constitutional validity of the statutes under consideration, and the judgment appealed from declares their alleged invalidity is the only defense interposed at the hearing. Judgment

Affirmed.

D. L. CROWELL, DAISY ROGERS AND HER HUSBAND, W. J. ROGERS, v. TALLASSEE POWER COMPANY.

(Filed 27 January, 1931.)

Highways D d—Held: damages could not be recovered for slight change in highway by power company resulting in mere inconvenience to plaintiff.

Where under the provisions of C. S., 1696, a hydro-electric power company has appropriated a section of a public highway and built another section in lieu thereof, the provisions of the statute that the company pay all damages assessed as provided by law does not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. *Grant v. Power Co.*, 196 N. C., 617, and *Colvin v. Power Co.*, 199 N. C., 353, cited and distinguished.

APPEAL by plaintiffs from *McElroy, J.*, at February Term, 1930, of DAVIDSON. Affirmed.

This is an action brought by plaintiffs against defendants for damages. The material allegation of plaintiffs is as follows: "That on or about 1 October, 1927, the defendant company closed up the said Cot-

CROWELL v. POWER CO.

ton Grove-Healing Springs road and in place thereof laid out and constructed a new road about a quarter of a mile or more to the south of the old road and to the south of plaintiff's lands, the new road being out of the way and a much longer distance from the plaintiff's lands, both to his residence and to Southmont and Lexington, so that the plaintiff is now compelled, in hauling timber or crops to Southmont and return, to travel an additional distance of about two miles further than by the former old road."

The defendant, Tallassee Power Company, denied the allegation. The evidence was to the effect that the location of the new road and discontinuance of the old road was done by the board of commissioners of Davidson County in pursuance of and by authority of law vested in them in the control and management of the public roads of the county. It was further in evidence that "The new bridge is several hundred yards below the old bridge. The new and old roads are about a quarter of a mile apart in the farthest place. The new road is graded."

Phillips & Bower for plaintiffs.

R. L. Smith & Sons and Raper & Raper for defendant.

PER CURIAM. The defendant at the close of plaintiffs' evidence made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below granted the motion and in this we can see no error.

C. S., 1696, is as follows: "Every electric power or hydro-electric power corporation which may exercise the right of eminent domain under the chapter Eminent Domain, where in the development of electric or hydro-electric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the board of county commissioners of the county in which such public highway is situate, shall have power to appropriate said public highway for the development of electric or hyro-electric power: *Provided*, that said electric power or hydro-electric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the board of county commissioners of the county in which said public highway is situated: *Provided further*, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road." (Italics ours.)

Plaintiff contends that under the above statute they have a right of action. That the case of *Grant v. Power Co.*, 196 N. C., p. 617, and *Colvin v. Power Co.*, 199 N. C., 353, are similar and controlling.

RUSSELL v. HARDWOOD CO.

From a careful reading of plaintiff's evidence, which it is unnecessary to set forth in detail, we think the above statute is not applicable to the present action and the cases cited by plaintiffs are distinguishable from the present one. The judgment below is
Affirmed.

R. LAWRENCE RUSSELL v. BOICE HARDWOOD COMPANY.

(Filed 27 January, 1931.)

Contracts F c—Burden is on party claiming that contract had been modified to prove such modification.

Where the defendant in an action for breach of a written contract has introduced parol evidence modifying its terms, and the court has permitted an amendment to the pleadings to be made in conformity therewith, the burden is upon the defendant to establish the fact that the contract as written had been modified.

CIVIL ACTION, before *Cowper, Special Judge*, at August Special Term, 1930, of HAYWOOD.

The plaintiff instituted an action upon a verbal contract which he alleged was made by the parties during the month of July, 1928, according to the terms of which the plaintiff was to haul logs owned by the defendant from a certain tract of land to the defendant's line of railroad. It was alleged that the contract provided compensation of \$14 per thousand feet for all logs so hauled, and in addition, that the defendant would furnish the plaintiff certain feed and supplies for workmen and teams. The plaintiff alleged and offered evidence tending to show that the defendant breached the contract. The defendant alleged that the contract between the parties was in writing and made 24 March, 1928, and that the plaintiff had breached the contract, such breach resulting in damage to the defendant.

The plaintiff alleged and offered evidence tending to show that the written contract was thereafter discharged by mutual consent of the parties and a verbal contract substituted therefor. Testimony offered by defendant tended to show that there was some verbal modification of the written contract, and the record shows that the court in its discretion allowed the defendant "to amend its answer so as to conform with its evidence and set up the written contract as modified in accordance with the testimony of Colonel Stouton.

The following issues were submitted:

1. "Did the plaintiff and defendant enter into the written contract of 24 March, 1928, as alleged in the answer?"

RUSSELL v. HARDWOOD CO.

2. "If so, was said written contract altered after its execution by the insertion thereon of the words, 'It is further agreed that the parties of the second part are to pay \$10 per month to sheriff's salary?' "

3. "Was said written contract modified after its execution as alleged in the amendment to the answer?"

4. "Was said written contract, by mutual consent of the parties, discharged and the verbal contract, as alleged in the complaint substituted therefor?"

5. "Did the defendant breach the verbal contract, as alleged?"

6. "What amount of damages, if any, is the plaintiff entitled to recover:

(a) By reason of anticipated profits prevented?

(b) By reason of work completed under verbal contract?

(c) By reason of the conversion of equipment and tools?"

7. "Did the plaintiff breach the contract set up in the answer and amendment thereto?"

The first issue was answered "Yes, by consent." The jury answered the second issue "No"; the third issue "No"; the fourth issue "Yes"; the fifth issue "Yes"; the sixth issue "(a) \$562, (b) \$338; (c) \$100"; the seventh issue "No," and the eighth issue "None."

From judgment upon the verdict the defendant appealed.

Jos. E. Johnson, John M. Queen and Morgan, Ward & Stamey for plaintiff.

W. R. Francis and Alley & Alley for defendant.

PER CURIAM. The chief exception relied upon by the defendant is the instruction of the trial judge to the jury to the effect that the burden of proof on the third issue was upon the defendant. The third issue was submitted by reason of the fact that the defendant at the close of all the evidence requested permission to amend its answer so that the pleading would conform to the evidence offered at the trial. Hence the defendant was compelled to take the position that the written contract relied upon by it had been modified by a verbal agreement. Thus the burden was upon the defendant to show the modification contended for.

There are other exceptions, but none of them warrant the overthrow of the judgment.

No error.

SPARROW *v.* FOLLEY.

T. M. SPARROW AND D. H. LEWIS *v.* M. H. FOLLEY.

(Filed 27 January, 1931.)

Evidence L b—Admission of judgment in evidence held not erroneous in this case.

In an action to recover the purchase price of a shingle mill alleged to have been sold and delivered to the defendant who assumed an existing mortgage thereon as a part of its purchase price, defendant denied liability on the ground of plaintiff's breach of a condition precedent. The jury having found against the defendant, it is *held*: the admission in evidence of a judgment against the plaintiff for the amount of the mortgage debt, which defendant admitted he owed if the contract was binding upon him, was not erroneous.

APPEAL by defendant from *Moore, J.*, at February Term, 1930, of MOORE. No error.

The jury returned the following verdict:

1. Did the plaintiff sell the defendant the shingle mill outfit as alleged in the complaint? Answer: Yes.

2. If so, what was the agreed purchase price for said shingle mill outfit? Answer: \$1,300.

3. In what sum, if anything, is defendant indebted to the plaintiffs in this action? Answer: \$1,003, with 6 per cent interest from 20 January, 1926.

H. F. Seawell, Jr., and J. Vance Rowe for plaintiffs.
Johnson & Johnson and U. L. Spence for defendant.

PER CURIAM. The plaintiffs brought suit to recover an amount claimed to be due them by the defendant on the purchase of a shingle mill. They alleged that they had sold the mill at the price of \$1,300; that the defendant had paid them \$300 and had assumed the payment of or had bought subject to a mortgage in the sum of \$1,000; that he had made default; that the mortgagee had sued them and had recovered a judgment for \$1,003.95, which they had paid; and that this payment had resulted directly from defendant's breach of the contract. The defendant alleged and testified that this purchase was made to depend on the precedent condition that the plaintiffs were to secure for him a man who was competent to operate the mill; that the plaintiffs had not done so, and that the trade was never consummated. Three issues were submitted to the jury, who found that the trade had been made as alleged in the complaint; that the price was \$1,300, and that the defendant was indebted to the plaintiffs in the sum of \$1,003, with interest at

AUSTIN v. PAVING Co.

6 per cent from 20 January, 1926. Judgment was given for the plaintiff and the defendant excepted and appealed.

The first exception, taken to the court's refusal to admit in evidence a judgment of the Superior Court of Bladen County in the case of *Thomas v. Sparrow et al.*, is without merit. The defendant admitted in his cross-examination that if he had bought the mill he would have been indebted to the plaintiffs in the sum of \$1,000, the remainder of the purchase price, and the jury found from the evidence that he had bought the property at the agreed price. The controversy was confined to matters involved in the three issues and under them the defendant was given the benefit of every instruction to which he was entitled. The defendant has no just cause to complain of the charge in view of the instructions upon the issues which were submitted without objection. We have considered all the exceptions and find no sufficient cause for granting a new trial.

No error.

H. M. AUSTIN v. WALTER J. BRYSON PAVING COMPANY.

(Filed 27 January, 1931.)

Master and Servant C b—Evidence held insufficient to be submitted to jury on question of employer's failure to furnish proper tools.

Evidence tending to show that the plaintiff employed in the construction of a highway was dissatisfied with a particular kind of plow point and was told by his superior employee to make one himself out of certain material left on the highway, and that the plaintiff employee selected an improper piece of material and was injured by a flying particle of steel as he was beating it into shape on an anvil with a sledge hammer, using his own selection of implements, *is held* insufficient to go to the jury on the issue of defendant's actionable negligence, and a judgment as of nonsuit is properly entered.

APPEAL by plaintiff from *Moore, J.*, at February Term, 1930, of STANLY. Affirmed.

This is an action brought by plaintiff against defendant for injuries sustained in trying to make a plow point used in road construction. Plaintiff alleges that while he was beating the plow point "a piece of hot steel flew off said plow point and hit plaintiff's forefinger on his left hand, and as a result thereof he was forced to have said finger amputated."

AUSTIN v. PAVING Co.

The plaintiff testified, in part: "They were doing highway work on State Highway No. 80, in Anson County near Wadesboro, N. C., and I was working for them there. I was employed to look after the teams and do anything the superintendent told me to do. A. B. Aiken was the superintendent. On the day I was injured, 27 June, 1929, I was trying to make a plow point; that is, I was trying to make a rooter plow point for a big tractor plow that was pulled by a tractor. The plow point I was trying to make was about one inch thick, 5 inches wide and 2 feet long, and was to be used for plowing up the old road. I was trying to make that plow point because Mr. Aiken had never brought me out one that I could plow with, and he told me to go down to the shop and make one; so I went down and tried it. The shop was beside the highway, and I was attempting to make the plow point by heating it on a small forge and hitting it on the small anvil with a sledge hammer. A colored fellow assisted me. I was trying to make the plow point out of a scarifier tooth. Mr. Aiken told me where to get the scarifier tooth and I got it by the side of the road where he told me to. It was old and rusty. When I was injured I was trying to make this plow point and heating it and hitting it with a sledge hammer, and I was trying to get it down and a piece of the rusty steel blew off and went in my forefinger; all we had there for the purpose of making this plow point was a small forge, a small anvil and a sledge hammer."

On cross-examination: "I got this piece of steel, out of which I was making this plow point, by the side of the road on the right-of-way. There were quite a number of those scarifier teeth there when I got that one. I picked out the one I wanted to make that plow point out of. I didn't think it was a good piece of steel when I selected it. I took it because I knew there was not a good piece of steel there. I picked out the piece that I thought was the best; I selected the one I wanted to use myself. . . . The piece that flew off and hit my finger was about the size of a grain of corn. . . . I could tell it was not a good piece of steel—it was rusty. . . . I did not see anything wrong with the hammer."

T. J. Austin, a witness for plaintiff, testified, in part: "A small forge, small anvil, sledge hammer and tongs constitute the equipment of shops in ordinary use on road construction work, out on the road where they do this class of work. They are usually found in shops like that. That is the equipment that is ordinarily used for sharpening scarifier teeth and for sharpening plows on road construction work."

R. R. Ingram, O. J. Sikes and R. L. Brown for plaintiff.
R. L. Smith & Sons for defendant.

DIXON v. COMRS. OF PITT.

PER CURIAM. At the close of plaintiff's evidence defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The motion was granted, and in this we can see no error.

The evidence excluded, to which exception and assignments of error were made by plaintiff, is not material on this record. "From the evidence it would seem that plaintiff made, and as it were, carried his own place of work with him, and used his own judgment as to the method of doing it." *Merritt v. Foundry Co.*, 199 N. C., at p. 777; *Key v. Chair Co.*, 199 N. C., 794, and cases cited.

The judgment of the court below is
Affirmed.

G. G. DIXON IN BEHALF OF HIMSELF AND OTHER TAXPAYERS OF AYDEN TOWNSHIP, PITT COUNTY, v. THE BOARD OF COUNTY COMMISSIONERS OF PITT COUNTY.

(Filed 27 January, 1931.)

1. Taxation A b—Levy of poll tax in excess of constitutional limitation is void.

The provisions of our State Constitution limiting the right of a county to levy a poll tax in excess of two dollars on each person between specified ages is an inhibition of any excess and is mandatory and self-executing, and the levy of an excess thereof by a county in certain of its townships with the approval of the township voters under statutory authority declaring it to be levied in lieu of personal labor on the roads, but specifically denominating it a poll tax, is unconstitutional and void, and will be restrained by the courts. Constitution, Art. V, sec. 1.

2. Same—County may not levy a poll tax in excess of two dollars.

The proportion between the property and the poll tax required to be observed by Constitution, Art. V, sec. 1, is entirely eliminated by the amendment of 1921, the amendment providing that such tax shall not be levied by a county in excess of two dollars, or by a city or town in excess of one dollar.

3. Constitutional Law E a—Federal provision does not apply to vested rights other than those under obligations under contract.

The provisions of Article I, section 10, of the Federal Constitution apply to obligations of a contract and not to other vested rights, and in this case *held*: the Federal provision has no application to the amendment of 1921 to Art. V, sec. 1, of the State Constitution relating to the limitation upon poll taxes, the amendment not affecting obligations of a contract prohibited by the Federal Constitution.

4. Taxation B g—Tax in this case held to be poll tax.

The requirement of citizens to work upon the roads is not a capitation or poll tax, or a tax at all, but a duty imposed upon certain citizens

DIXON v. COMRS. OF PITT.

within certain limits of age, but where an act levies a tax in certain townships upon a vote of its citizens, upon the males compellable to perform road work, and no choice is given between the personal work and the payment of the tax, the act levies a poll tax, and if the amount thereof is in excess of the constitutional limitation, it is void.

APPEAL by defendant from *Barnhill, J.*, at Chambers in PITT County on 30 May, 1930.

This is a suit to restrain the defendant from levying and collecting a special capitation tax in excess of \$2.00 and from applying the proceeds of the special poll tax outside the township in which it purports to be levied.

The complaint contains the following allegations:

2. That pursuant to a special act of the Legislature, session 1917, the defendant board of county commissioners of Pitt County have for the past several years, and in 1929 in particular, assessed a capitation tax of \$6.00, in excess of the amount allowed by the Constitution, and are now about to assess for the year of 1930 a capitation tax of \$6.00, in excess of that allowed by the Constitution, against the plaintiff and other citizens of Ayden Township, Pitt County, said capitation tax being levied in the specific sum of \$6.00 upon the plaintiff and each person in Ayden Township within the class of persons between the age of 21 and 50 years, without reference to his or their property or lack of it, by the said board of county commissioners, in lieu of personal service on the roads.

3. That said capitation tax is illegal and a violation of section 1, Article V of the Constitution of North Carolina, which provides that, "The General Assembly may levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age, which said tax shall not exceed \$2.00. No other capitation tax shall be levied": and said section 1, Article V of the Constitution of North Carolina is made a part of this allegation.

4. That in addition to the capitation tax assessed against the plaintiff and other citizens of Ayden Township in the sum of \$6.00, the board of county commissioners of Pitt County assessed a capitation tax in excess of that allowed by the Constitution in Beaver Dam Township in the sum of \$6.00, in Belvoir Township in the sum of \$5.00, in Carolina Township in the sum of \$5.00, in Chicod Township in the sum of \$4.00, in Falkland Township in the sum of \$6.00, in Pactolus Township in the sum of \$4.00, in Swift Creek Township in the sum of \$5.00; in Winterville Township in the sum of \$6.00; in Farmville Township, nothing; and in Greenville Township, nothing.

5. That the lack of uniformity in the assessment of said capitation tax, ranging in the various townships of Pitt County from \$6.00 to

DIXON v. COMRS. OF PITT.

nothing, is unequal, unjust, a discrimination, and illegal, in violation of section 3, Article V of the Constitution of North Carolina, which requires a uniform rule for taxes, and section 3, Article V of the Constitution of North Carolina is hereby made a part of this allegation.

6. That the money collected from said capitation tax as alleged above is disbursed by the board of county commissioners from the general funds for roads through the Pitt County Highway Commission on the roads of Pitt County in general, and entirely outside Ayden Township.

7. That the application of said capitation tax is illegal and in violation of section 2, Article V of the Constitution of North Carolina, which provides that "the proceeds of the State and county capitation tax shall be applied to the purpose of education and the support of the poor. . . ." and section 2, Article V of the Constitution of North Carolina is hereby made a part of this allegation.

The defendant answered and at the hearing Judge Barnhill found the following facts:

"First. Under and pursuant to chapter 110, Public-Local Laws, session 1917, Ayden Township and certain other townships in Pitt County, each held an election and voted a special tax, as provided by said act, the capitation tax in Ayden Township being fixed at \$6.00 in addition to the regular poll tax of \$2.00 levied in said county; certain other townships voted a capitation tax in addition to said tax in various sums ranging from four to six dollars; and certain townships had no such elections and levied no such taxes.

Second. The roads of Pitt County are worked upon a unit basis, the county maintaining one central convict camp and nine maintenance camps throughout the county. There is allotted to each maintenance camp a certain division of the county embracing certain townships or portions thereof for the purpose of maintenance.

Third. The taxes collected in those townships holding such elections are collected by and paid to the sheriff and by him paid to the treasurer of the county, who keeps those funds, together with the property tax levied for road purposes, in one fund, the books of the treasurer and the auditor, however, disclosing the amount collected from several townships from polls and from property tax for roads. The funds so collected are expended in the construction and maintenance of the roads of Pitt County under a unit system. The highway commission, however, undertakes to apportion to each township and to expend therein a fund equal to the amount collected for such township.

Fourth. The capitation tax voted in Ayden Township under said act was first levied, assessed and collected in the year 1920.

Fifth. The citizens of Farmville Township were relieved from the duty of the work on the roads by an act of the Legislature of the

DIXON v. COMRS. OF PITT.

session of 1917; and the citizens of Greenville Township were relieved from such duty by an act of the Legislature of the session of 1915.

Sixth. The Highway Commission of Pitt County constructs and maintains the roads of said county as a unit under chapter 453 of the Public-Local Laws of 1919 and the amendments thereto.

Seventh. The county commissioners annually levy for the construction and maintenance of roads a county-wide tax, the rate for 1929 being 26 cents."

Upon the facts judgment was given for the plaintiffs and the defendant excepted and appealed.

M. B. Prescott and Pittman & Eure for plaintiffs.

F. G. James & Son for defendant.

ADAMS, J. At the session of 1917 the General Assembly passed a public-local act to provide a poll tax for the maintenance of the public roads of Pitt County in lieu of the personal work required by section 3806 of the Consolidated Statutes. The act provides that upon presentation of a petition in writing, signed by not less than one-fourth of the qualified voters of any township in the county, requesting the board of county commissioners to submit to the qualified voters of the township in which the petitioners reside the question of levying a poll tax, the board shall within thirty days order an election to be held in the township giving the qualified electors therein the right to determine by ballot whether the poll tax shall be levied as a substitute for personal service. There is a proviso that the tax so voted shall not be less than three nor more than six dollars on the poll. Pursuant to the act the board of commissioners, upon petition, ordered an election on the proposition in Ayden Township and the qualified electors therein voted for the levy of a poll tax of six dollars in addition to the regular poll tax of two dollars. This tax has been levied annually since 1920, the year in which the election was held. The object of this proceeding is to enjoin the further collection of the additional poll tax of six dollars.

When the election was held Article V, section 1, of the Constitution was as follows: "The General Assembly shall levy a capitation tax on every male inhabitant in the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

Amendment of this section was submitted to and approved by the people in the fall of 1920 and became effective on the certificate of

DIXON v. COMRS. OF PITT.

the Governor on 1 January, 1921. The amended section is in these words: "The General Assembly may levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which said tax shall not exceed two dollars, and cities and towns may levy a capitation tax which shall not exceed one dollar. No other capitation tax shall be levied. The commissioners of the several counties and of the cities and towns may exempt from the capitation tax any special cases on account of poverty or infirmity."

In reference to the amendment this Court said in *Hammond v. McRae*, 182 N. C., 747, 754: "It will thus be noted that the requirement as to the proportion between the poll and property tax is entirely eliminated, and that the only poll tax permitted is one by the State, which may not exceed \$2, and by the cities and towns, which may not exceed \$1, and that no other poll tax may be imposed. In so far as a poll tax is concerned, this substituted section of the Constitution being, as it is, inhibitive in terms and plain of meaning, is to be considered as self-executing and as to all elections held and liabilities incurred after it became a part of our organic law, has the effect of repealing all laws and clauses of laws which impose a poll tax in contravention of its provisions. *Kitchin v. Wood*, 154 N. C., 565, and authorities cited. . . . It may be well to note that as to all liabilities theretofore incurred and all bonds theretofore issued under statutes or elections requiring the levy of a tax on both property and poll, the power and obligation to levy the tax on both will continue, for a State, no more by constitutional amendment than by statute, can impair the vested rights held by the creditor in assurance of his debt. *Smith v. Commissioners*, ante, 149, citing, among others, *Port of Mobile v. Watson*, 116 U. S., 289."

The appellant suggests that the election was held and the tax in question was voted before the amendment of the first section of Article V of the Constitution was adopted. The intimation is that to say that the constitutional amendment of 1921 supersedes the law under which the tax was voted in 1920, would be an interference with vested rights. The Federal Constitution provides that no State shall pass a law impairing the obligation of contracts. Art. I, sec. 10. But a State law which divests vested rights violates no constitutional provision where it does not impair the obligation of a contract. "It is only when legislation acts upon contracts as distinct from vested rights that the prohibition against impairing the obligation of contracts is infringed. . . . A State may pass laws which will operate to divest antecedent rights if they do not technically impair the obligation of contracts." Annotated Constitution of United States, 291; *Satterlee v. Matthewson*, 2 Peters 413, 7 L. Ed., 458; *Charles River Bridge v. Warren Bridge*, 11 Peters, 582, 9 L. Ed., 773; *Long Island Water Supply Co. v. Brooklyn*, 166

DIXON v. COMRS. OF PITT.

U. S., 691, 41 L. Ed., 1165. The record in the case before us discloses no vested rights which the amendment impairs—no “rights held by a creditor in assurance of his debt.” So, the question to be considered is whether the tax levied under the act of 1917 is a poll or a commutation tax. If it is a poll tax the amended section, being self-executing as stated in *Hammond's case*, prohibits a levy above the limitation therein prescribed.

This Court has held in a number of cases that the requirement to work on the public roads (C. S., 3806) is not a poll or capitation tax. Indeed, it is not a tax of any kind; it is a duty imposed by law upon “all able-bodied male persons between the ages of eighteen years and forty-five years.” *S. v. Sharp*, 125 N. C., 628; *S. v. Covington*, *ibid.*, 641; *S. v. Wheeler*, 141 N. C., 773; *S. v. Taylor*, 170 N. C., 693. It is said in the case last cited that legislative provision for the payment of a fixed sum in lieu of personal service is merely a method of commuting liability to work on the public roads. The substance of the statute there considered was this: that any person liable to personal service on the roads might pay the sum of four dollars in lieu of such labor. The defendant had the right to elect between paying the money and doing the work. To this extent the tax was commutative.

But under the public-local act of 1917, *supra*, the tax is not a commutation. The taxpayer is not given the right to pay a sum of money for the privilege of exemption; he has no personal choice; in the election he may have opposed the approval of the tax; but according to the appellant's contention he is bound by it. Does not the act in its practical effect impose the tax upon many who are least able to bear the burden?

Moreover, the statute in express terms designates the tax a “poll tax.” The board of commissioners, upon petition filed, is required to order an election on the question of increasing the “poll tax” to the amount specified. A poll tax is defined as a capitation tax; a tax of a specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class without reference to his property or lack of it. *Black's Law Dictionary*, 911. The inhibition in Article V, section 1, of the Constitution is the levy of a capitation tax in excess of two dollars. The capitation or poll tax levied under the act of 1917 is six dollars; the regular capitation tax is two dollars; the total capitation tax in Ayden Township is eight dollars. However much the maintenance of the tax may be desired or whatever its effect in reducing the tax on land and transferring it to the landless, the Constitution as amended is a barrier to the further levy of the poll tax of six dollars in Ayden Township.

Judgment affirmed.

MARTIN v. SANATORIUM.

MRS. DAISY V. MARTIN, DECEASED, AND J. H. MARTIN, v. GLENWOOD PARK SANATORIUM AND AMERICAN EMPLOYERS INSURANCE COMPANY, CARRIER.

(Filed 27 January, 1931.)

1. Master and Servant F a—Workmen's Compensation Act should be liberally construed to effectuate legislative intent.

The legislative intent should be ascertained and given effect in construing the Workmen's Compensation Act, and its benefits should not be denied upon technical, narrow or strict construction.

2. Statutes B a—Definitions in act are a part thereof but will not be given meaning beyond necessary import or allowed to defeat intent.

While as a general rule definitions contained in an interpretative clause of a statute are a part of the act, their meaning will not be extended beyond their necessary import or be allowed to defeat the legislative intent otherwise therein clearly expressed.

3. Master and Servant F g—Widower is presumed to be dependent of wife killed in accident compensable under Workmen's Compensation Act.

Construing section 2, subsection (o) of the Workmen's Compensation Act defining a widower entitled to the benefits as one who had lived with the wife at the time of her death and "was dependent upon her for support" in connection with section 39 defining dependents, it is *held*: to fully support the beneficial intent of the act the provisions in the latter to the effect that the widower be conclusively presumed a dependent of the wife is manifestly clear, and that under this presumption he is entitled to compensation for the death of his wife with whom he was living when her death was caused by an accident arising out of and in the course of her employment.

4. Statutes B a—Apparent repugnancy in two sections of an act will be reconciled if possible by reasonable construction.

Where there are clauses of a statute that are repugnant to each other and cannot be reconciled by reasonable interpretation the latter in place will repeal the former; but the section will be reconciled if possible by reasonable construction.

APPEAL by defendants from *Schenck, J.*, at August Term, 1930, of GUILFORD. Affirmed.

Statement and award by Commissioner Dorsett: In the original application for review, the defendants claimed two grounds upon which the award should be set aside, namely: First, for that J. H. Martin was not a dependent of the deceased, and, therefore, not entitled to compensation; Second, for that the injury complained of was not an accident.

When the case was called for hearing and argument, the defendants announced that it had abandoned the second assignment of error, and rested its appeal upon the one question—that the claimant, J. H.

MARTIN *v.* SANATORIUM.

Martin, widower of the deceased, Daisy V. Martin, was not dependent upon his wife, and therefore, not entitled to compensation.

In support of this position, the defendants contend that section 39 of the act, which provides that, "A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee," should be read and interpreted along with subsection (o) of section 2, of the act, which defines a widower as: "The term 'widower' includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her."

It was admitted that the claimant was not dependent for support upon his wife, and upon that question the following testimony was offered: "Q. Were you dependent on Mrs. Martin for support? A. No, I wouldn't say that. Q. Did she ever contribute in any way to your support? A. Well, she was just like any good woman; she was always buying something for the house. Q. Did she ever contribute to your support? A. No."

It appears from the evidence that the deceased, Mrs. Martin, had one son 22 years of age, who was not dependent upon her, and who was engaged in a gainful occupation, and that if the husband is not conclusively presumed to be dependent upon her then she has no dependents.

By reference to section 39, of the act, it will be seen that this presumption of dependency is declared twice in the first three lines of the section, and again in the last paragraph of the section, which provides: "The widow, or widower, and all children of deceased employees, shall be conclusively presumed to be dependents of deceased, and shall be entitled to receive the benefits of this act for the full periods specified in the act."

While we cannot ignore the definitions, as set out in section 2 of the act, yet attention must be given to the first line of the section, which provides as follows: "When used in this act, unless the context otherwise requires—" the following definition shall govern. "Context" means: "The entire text or connected structure of a particular discourse or writing."

If it could be said that there was doubt as to the legislative intent in the first sentence of section 39, certainly the last paragraph of this section dispells all doubt as to what the Legislature intended to say. Subsection (o) of section 2, may be harmonized with the context by construing the word "and" in line two, to mean and read "or."

As a general rule definitions contained in an interpretation clause are a part of the law, but they will not be extended beyond their necessary

MARTIN v. SANATORIUM.

import, nor will they be allowed to defeat the legislative intent, otherwise clearly manifested in the act.

In section 39, the Legislature emphasized its intention that a widower should be conclusively presumed to be dependent upon his wife, and the rule is that if two statutes, or two sections or parts of the same statute, relating to the same subject, shall not be reconciled by any fair and reasonable method of construction, the last in point of time will control; and if there is a similar conflict between two clauses or sections of the same statute, effect must be given to the last in order of position overriding the earlier.

"The findings, award, and opinion of Commissioner Dorsett are hereby affirmed, and adopted as the findings, opinion, and award of the full Commission. Matt. H. Allen, Chairman."

Thereafter in apt time the defendant, the American Employers Insurance Company, the carrier, appealed to the Superior Court of Guilford County, North Carolina, and the N. C. Industrial Commission duly certified the case to the Superior Court of Guilford County, where it was docketed for a hearing.

At the August Term, 1930, of the Superior Court of Guilford County, this case was heard before his Honor, Michael Schenck, judge presiding, and after the hearing before said judge, judgment was rendered and signed by him as follows:

Judgment: "This cause coming on to be heard and being heard at the August Term, 1930, of Guilford County Superior Court for the trial of civil causes, pursuant to section 60 of the North Carolina Workmen's Compensation Act as ratified by the General Assembly, 11 March, 1929, upon appeal by the defendants, above named, from a decision of the North Carolina Industrial Commission, upholding and affirming an award and the conclusions of law theretofore made by Commissioner Dorsett, awarding compensation to the above named plaintiffs, and the court being of the opinion that the findings, award and decision of the North Carolina Industrial Commission should be upheld and affirmed:

It is, therefore, ordered, adjudged and decreed that the findings, award and opinion of the North Carolina Industrial Commission be, and the same is hereby in all respects affirmed and adopted as the findings, opinion and award of this court.

This, the 25th day of August, 1930."

From this judgment the defendants excepted, assigned error and appealed to the Supreme Court.

A. C. Davis for plaintiffs.

King, Sapp & King for defendants.

MARTIN v. SANATORIUM.

CLARKSON, J. In this day and age in this commonwealth, the wife no longer, as in the days gone by, confines her activities strictly to home and domestic duties. The "help meet" frequently takes her part in industry, not connected with the home. Whether this is for weal or woe, we are not here called upon to determine. This being a fact, the General Assembly of North Carolina, in reference to the wife as a wage-earner, no doubt, in view of this changed condition, passed the provisions in the North Carolina Workmen's Compensation Act we are now called upon to construe. On the present record the only question presented: "Is the plaintiff, J. H. Martin, widower of Daisy V. Martin, deceased employee, conclusively presumed to be dependent upon his said wife for support, and as such entitled to compensation under the North Carolina Workmen's Compensation Act?" We think so. The husband and wife were living together at the time of her death, and had been for years.

In *Johnson v. Hosiery Co.*, 199 N. C., at p. 40, we find: "It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. . . . *National Cast Iron Co. v. Hegginsbotham*, 112 Southern, 734; *Eddington v. Northwestern Bell Telephone Co.*, 202 N. W., 374." *Smith v. Light Co.*, 198 N. C., 614; *Reeves v. Parker-Graham-Sexton, Inc.*, 199 N. C., 236; *Rice v. Denny Roll & Panel Co.*, 199 N. C., 154.

There is no dispute on the record that the wife "sustained an accidental injury, from which she died on 10 September, 1929, that arose out of and in the course of her employment as a nurse at the Glenwood Park Sanatorium."

The defendants contend that from the testimony of her husband, he is barred from recovery: "Q. Were you dependent on Mrs. Martin for support? A. No, I wouldn't say that. Q. Did she ever contribute in any way to your support? A. Well, she was just like any good woman; she was always buying something for the house. Q. Did she ever contribute to your support? A. No."

This testimony must be considered in reference to the Compensation Act. From the husband's testimony, "She was always buying something for the house," it may be inferred that by the contributions from her labor she made the home more comfortable and attractive than he alone was able to do from his salary. Our decision must be premised on the language and intent of the North Carolina Workmen's Compensation Act. In reference to the subject, it reads as follows:

"Section 2. When used in this act, unless the context otherwise requires." . . . Subsection (o) reads as follows: "*Widower defined*. The term 'widower' includes only decedent's husband, who at the time

MARTIN v. SANATORIUM.

of her death lived with her and was dependent for support upon her.” . . . Section 39, reads as follows: “*Dependents defined.* A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency. The widow, widower, and all children of deceased employees shall be conclusively presumed to be dependents of the deceased and shall be entitled to receive benefits of this act for the full periods specified in the act.”

It will be noted that in section 39, “*Dependents defined,*” the section says in the first part that the widower “shall be conclusively presumed to be wholly dependent for support upon the deceased employee.” In the latter part the widower “shall be conclusively presumed to be dependents of the deceased and shall be entitled to receive benefits of this act for the full periods specified in the act.”

We are not here considering the wisdom of the legislation, that is for another branch of the government. We are called upon to construe the meaning.

But in 25 R. C. L., part sec. 70, at p. 777, we find: “Many of the statutes, however, provide that husband and wife shall be presumed to be dependent on each other for support, if they are living together, or are living apart for some justifiable cause. Some of the acts make no distinction between the dependency of the husband and the presumption in favor of the wife. If a wife living with her husband is fatally injured in an employment coming under the act, the husband living with her at the time of her death is likewise conclusively presumed to be wholly dependent for support upon her, irrespective of what the real facts may be.”

In *Kornegay v. Goldsboro*, 180 N. C., at p. 452: “The Court, speaking through *Hoke, J.*, says (*Bramham v. Durham*, 171 N. C., at p. 198): ‘It is a well recognized principle of statutory construction that when there are two acts of the Legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment, but, to the extent that they are necessarily

SHALE PRODUCTS CO. v. CEMENT CO.

repugnant, the latter shall prevail. The position is stated in substantially these terms by *Associate Justice Field* in *U. S. v. Tynen*, 78 U. S., 92, as follows: "Where there are two acts on the same subject, the rule is to give effect to both, if possible; but if the two are repugnant in any of their provisions, the latter act, and without any repealing clause, operates to the extent of the repugnancy as a repeal of the first"; and in *Sedgewick on Statutory Construction*, p. 127, quoting from *Ely v. Bliss*, 5 Beavan, it is said: "If two inconsistent acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed, without derogation from the first, it is the first that must give way." " The North Carolina Workmen's Compensation Act was passed as a whole, yet by analogy we think the above principle prevails in construing the sections relating to the subject if they are irreconcilable. *Leonard v. Sink*, 198 N. C., p. 119.

The acts of the various states differ—some are manufacturing states, some agricultural and some both. This State is now to a considerable extent a manufacturing State. We are concerned here only in construing the act of this State. We think the construction placed on it by the unanimous decision of the Industrial Commission and the court below correct. The judgment is

Affirmed.

REICHLAND SHALE PRODUCTS COMPANY, a CORPORATION, AND SUCH OTHER PARTIES AS WANT TO COME IN AND BE MADE PARTIES TO THIS ACTION, v. SOUTHERN STEEL & CEMENT COMPANY, A CORPORATION.

(Filed 27 January, 1930.)

1. Taxation D b—Lien for taxes attaches to realty on statutory date, but does not attach to personalty until levy thereon.

The lien for taxes attaches to the real property taxed from the date provided in the statute, and the lien continues thereon until the taxes are paid, regardless into whose hands the property has passed, C. S., 1220, 8003, unless barred by some statute of limitations, but there is no lien upon the personal property for taxes except from the date of levy thereon, C. S., 2815, and the provisions of C. S., 8006, require that the taxpayer, mortgagee or lien holder to point out personalty out of which taxes on real property may be paid in order to have the right that the personalty of the taxpayer be first used before resorting to the real estate.

2. Taxation H b—Where county enforces lien under C. S., 8037, the limitations therein prescribed apply.

The lien for taxes can be enforced by the State or its political subdivisions under C. S., 7990, and no statute of limitations applies to the

SHALE PRODUCTS CO. v. CEMENT CO.

sovereign in such action, but where the State or its political subdivisions elect to proceed under C. S., 8037, the limitations therein prescribed apply.

3. Corporations H d—County tax on property of insolvent corporation held collectible by foreclosure of tax certificate and not from personalty.

Where a city and county advertise and sell the property of a corporation for taxes and buy in the certificates of sale, and thereafter the corporation is put in a receiver's hands, in an action in the nature of a creditor's bill, the original plaintiff therein pointing out, after, the tax sale and the issuance of tax certificates, personalty in the hands of the receiver and asking that the taxes against the corporation be satisfied therefrom: *Held*, the sovereign is not a party to the action, and the real property, burdened by mortgages and tax liens, not being assets of the corporation, and the creditor having failed to point out the personalty of the corporation out of which the taxes could have been paid until after the tax sale and the issuance of the tax certificates, C. S., 8006, he is not entitled to have the taxes paid out of the personalty in the hands of the receiver as against the other creditors of the corporation, and the municipalities may foreclose the tax certificates as prescribed by statute. C. S., 8037.

APPEAL by plaintiff, Wachovia Bank and Trust Company, from *Oglesby, J.*, at October Term, 1930, of BUNCOMBE. Reversed.

This is a creditor's bill, brought by plaintiff, a corporation, against defendant, a corporation, on the ground of the insolvency of defendant and that a receiver be appointed to take charge of the property. A temporary, and then a permanent receiver was appointed.

The Wachovia Bank and Trust Company intervenes and asks that it recover against defendant its indebtedness. That said receiver be ordered to pay to said intervening plaintiff, Wachovia Bank and Trust Company, its proportionate part of the assets in the hands of said receiver. It was duly made a party plaintiff and the debt was ascertained as \$44,547.52 and interest, and was admitted to be correct. Said bank had no security and was a general creditor. All the assets of the insolvent corporation have been converted into cash by the receiver, who has \$11,500 in money.

Facts found by the court below, in part: That the taxes due the city of Asheville for the year 1929, are due and unpaid, but none of said property so listed for taxes for the year 1929, has been sold for non-payment of city of Asheville taxes for that year. The aggregate taxes, penalties, interest and costs due and for which defendant's property was sold for the years 1928, and 1929, by Buncombe County and by the city of Asheville for the year 1928, is \$5,591, exclusive of statutory penalties and interest attaching thereto for the right of redemption; that \$987.22 of said amount represents the 1928 county taxes, interest,

SHALE PRODUCTS CO. *v.* CEMENT CO.

penalties and costs to the date of sale on the property covered by the deed of trust in favor of the Federal Mortgage Company, and that \$1,467.33 of said amount represents the 1928 city taxes, interest, penalties and costs to date of sale on the property covered by said deed of trust in favor of the Federal Mortgage Company. That the taxes assessed against the property owned by said corporation in the year 1929, by the city of Asheville and for said year, exclusive of interest and penalties, for nonpayment, is \$134.20. On 26 July, 1930, Federal Mortgage Company served written notice upon Fred A. Hull, Esq., tax collector of the county of Buncombe, and upon H. Grady Reagan, Esq., tax collector of the city of Asheville, notifying said tax collectors that said Federal Mortgage Company is the owner of the indebtedness secured by the deed of trust referred to in favor of Federal Mortgage Company, and that said Southern Steel and Cement Company owned said property at all times during the year 1928, and that the taxes on said property for the year, together with all interest, costs, penalties and other charges thereon are unpaid, and that John E. Thayer, the receiver herein, has taken into his possession personal property and assets of the defendants, Southern Steel and Cement Company, and at the time of said notice, had in his possession personal property more than sufficient in value and amount to pay the said taxes, interest, costs and penalties due the county of Buncombe and city of Asheville; which said property and money were specifically pointed out to said tax collectors, who, thereupon made demand upon said receiver for the said taxes, interest, costs and penalties, and served notice of their claims, and made demand upon said receiver for all of the taxes due the county of Buncombe and city of Asheville upon real property of the defendant, Southern Steel and Cement Company, for the years 1928 and 1929. That the receiver thereupon filed a petition in this cause asking the court for advice as to payment of said taxes out of the funds in the hands of the receiver, and this hearing was had and this order is made in the premises upon said hearing. Upon said hearing the court being of the opinion that the said motions of said tax collectors should be allowed and that said taxes should be paid. After finding the facts above and other facts unnecessary to set forth, but which will be referred to in the questions involved, the court below rendered the following judgment:

"It is now, ordered, adjudged and decreed that the receiver herein pay forthwith any and all taxes due the county of Buncombe, together with all interest, costs, penalties and charges thereon and claimed by said tax collector of the county of Buncombe, as hereinbefore set forth, to the tax collector of the said county of Buncombe, and pay forthwith any and all taxes due the city of Asheville and claimed by the tax

SHALE PRODUCTS CO. v. CEMENT CO.

collector of said city of Asheville, as hereinbefore set forth, together with all interest, costs, penalties and charges thereon, to the tax collector of the said city of Asheville, out of the moneys and assets in the hands of said receiver."

The Wachovia Bank and Trust Company excepted to the judgment, assigned error and appealed to the Supreme Court.

Bourne, Parker, Arledge & DuBose for Wachovia Bank and Trust Company.

Sale, Pennell & Pennell for John E. Thayer, Receiver.

Heazel, Shuford & Hartshorn for Federal Mortgage Company, Fred A. Hull, Tax Collector for Buncombe County, and Grady Reagan, Tax Collector for city of Asheville.

CLARKSON, J. We think the record bears out the statement of the question involved, as follows: Is the receiver of an insolvent corporation required by law to pay the taxes on land, some of which was formerly owned by the said corporation, but disposed of more than a year before its insolvency, and the rest of which was owned by said corporation at the time the receivership was created, and which is heavily mortgaged and admittedly not an asset of said defendant corporation when all of said lands have been sold by the tax collectors, and the tax sales certificates therefor bought by the municipal and county authorities for amounts exactly equal to the taxes, penalties, interest and cost, and the tax collectors duly given credit for the purchase price of said tax sales certificates in the settlement with such authorities? We think not under the facts and circumstances of this case.

C. S., 2815: "The lien for taxes levied for any and all purposes in each year shall attach to all the real estate of the taxpayers within the city on the first day of May annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid. *But there shall be no lien for taxes on the personal property of the taxpayer but from a levy thereon.*" (Italics ours.) C. S., 7986, 7987; *Carstarphen v. Plymouth*, 186 N. C., 90; *Chemical Co. v. Williamson*, 191 N. C., 484; *Shaffner v. Lipinsky*, 194 N. C., 1. See Public Laws 1929, ch. 306.

C. S., 8006, as amended by chapter 221, Public Laws 1927, is as follows: "The personal property of the taxpayer shall be levied upon and shall be sold for the satisfaction of his taxes before resorting to his real estate, if sufficient personalty subject to levy and sale can be found in the county of the sheriff having the tax list in hand; *Provided*, it shall be incumbent upon the taxpayer, mortgagee or other lien holder on taxpayer's realty, if said mortgagee or other lien holder has notified the

SHALE PRODUCTS CO. v. CEMENT CO.

sheriff that he holds such mortgage or other lien, to point out to the sheriff personalty out of which the taxes may be made or else such taxpayer shall forfeit his rights under this section and his real estate shall be subject to the lien for taxes as if no other property had been listed by him." Before the sale of the realty, for taxes, the Federal Mortgage Company did not point out personalty out of which the taxes may be made. *Craven Co. v. Parker*, 194 N. C., 561.

C. S., 1220, provides that corporate property in receivers' hands is liable for taxes. C. S., 8003—Fiduciaries to pay taxes. C. S., 7985—A creditor's bill can be instituted to enforce collection of taxes by the sovereign. *S. v. Georgia Company*, 112 N. C., 34.

The whole matter is statutory. There can be no lien on personal property but from the levy; on real estate the lien will attach each year from the date provided by statute and shall continue until the taxes with penalty and costs shall be paid, unless there is some statute of limitations to the contrary applying to the sovereign. The tax lien can be enforced by action to foreclose under section 7990 and no statute of limitation applies to the sovereign in such action. *New Hanover Co. v. Whiteman*, 190 N. C., 332.

The law is full, clear and explicit that taxes are a primary burden on property and must be paid. The question in this action seems to be who shall pay these taxes—the Wachovia Bank and Trust Company and other creditors of defendant, or the Federal Mortgage Company? This appears to be more of a controversy between these parties than the sovereign. The sovereign seemed satisfied with the tax certificates. The tax collector only acted in the premises at the instance of the Mortgage Company under a statute that the Mortgage Company invoked. It may be noted that this was done after the tax collectors had sold the land. This is not an action by the sovereign. In *New Hanover County v. Whiteman*, *supra*, at p. 333, a distinction is drawn between C. S., 7990, where the sovereign sues to foreclose a *tax lien* no statute of limitation applies, and C. S., 8037. It is there said: "Counties and other municipal corporations may proceed under C. S., 8037, *if they shall so elect*, when the tax-sale certificates, or tax deeds, held by them, remain unredeemed. . . . This statute expressly provides that it may be invoked by those who elect to proceed thereunder, *and when election is made to sue under C. S., 8037, the limitations therein prescribed apply*, and the benefits accrue." (Italics ours.) Chapter 221, Public Laws 1927, sec. 3, repeals C. S., 8028, 8029, 8030, 8031, 8032, 8033, 8034, 8035, 8036 and 8037, and substitutes a new C. S., 8037, but this does not affect the construction as placed on the former in the above decision.

SHALE PRODUCTS Co. v. CEMENT Co.

C. S., 8037, as substituted, reads as follows: "Every holder of a sheriff's certificate of sale of real estate for taxes shall have the right of lien against all real estate described in the certificate as in case of mortgage, and shall be subrogated to the rights of the State, and of the county, or other municipal corporation for the taxes for which such real estate was sold, and shall be entitled to a judgment for the sale of such real estate for the satisfaction of whatever sums may be due to him upon such certificate of sale. . . . *Such relief shall be afforded only in an action in the nature of an action to foreclose a mortgage,* which action must be commenced as herein provided. Such actions shall be governed in all respects as near as may be by the rules governing actions to foreclose a mortgage. . . . Every county or political subdivision of the State, which is now, or may hereafter become, the holder by purchase at sheriff's sale of land for taxes of any certificate of sale, shall bring action to foreclose the same within 18 months from the date of the certificate. . . . All certificates of sale evidencing purchases by counties shall immediately, upon being allowed as a credit in the settlement with the sheriff of the county, be delivered to the county accountant, county auditor, or other officer, specifically designated by the board of county commissioners, or other governing board of the county, except sheriff or tax collecting officer, and it shall be the duty of the officers, or such officer designated, to collect the same." (Italics ours.) See Public Laws 1929, chap. 204 and 334. *Orange County v. Jenkins*, ante, 202.

C. S., 8028, as substituted by chapter 221, Public Laws 1927, provides: "*Every county, person, firm or corporation, private or municipal,* who has purchased any lands or interest in the same, at any tax sale, as evidenced by sheriff's certificate of sale, shall have the right of foreclosure of said certificate of sale by civil action, and *this shall constitute his sole and only remedy* to foreclose the same." (Italics ours.)

The city and county pursued the statutory remedy given of selling the real estate for taxes (except the city tax of 1929, which the receiver will have to pay), and had the property sold. The property was purchased by the city and county, and certificates issued.

The city and county, for the taxes due on the land of defendant, did not levy on the personal property of the defendant to pay the taxes, as it had a right to do; but the land was advertised and sold under the other statutes in force; and at the sale the city and county were the purchasers for the amount of taxes due by defendant with interest, penalty and costs, and certificates were duly issued. This remedy was pursued and the city and county are now the holders of the certificates for the taxes due by defendants, which is a first lien on the land. The tax collectors, in settling up their tax books were allowed credit for the

BAKER v. STATE.

amount of said taxes. No cash was paid, but credit allowed in settlement for the taxes due by the tax collectors.

We think that under the facts and circumstances of this case, the remedy of foreclosure must be pursued. The city and county have a statutory mortgage on the land, which can be foreclosed as the ordinary mortgage. *S. v. Georgia Company, supra*, is distinguishable from the present case.

For the reasons given, the judgment of the court below is
Reversed.

JOE BAKER, EMPLOYEE, v. STATE OF NORTH CAROLINA, SELF INSURER.

(Filed 27 January, 1931.)

- 1. Master and Servant F a—Employee within meaning of the act is person engaged in employment under any appointment of contract or hire.**

Whether one is an employee within the meaning of the Workmen's Compensation Act does not solely rest upon the existence of the technical relation of master and servant, but a person is an employee thereunder if he is engaged in employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, and includes all employees of the State or its political subdivisions except such as are elected by the people or the General Assembly or appointed by the Governor.

- 2. Same—Workmen's Compensation Act should be liberally construed to effectuate the legislative intent.**

The legislative intent should be ascertained and given effect in construing the Workmen's Compensation Act, and its benefits should not be denied upon technical, narrow or strict construction.

- 3. State E a—The State has consented to liability for injuries to its employees compensable under the Workmen's Compensation Act.**

The State of North Carolina has consented to liability for injuries to its employees other than the employees elected by the people or the General Assembly, or appointed by the Governor, whose injuries are compensable under the Workmen's Compensation Act.

- 4. Master and Servant F a—Private in National Guard held entitled to compensation for injury sustained while performing duty.**

By statute the State has provided for payment in a certain manner to privates who have enlisted in the North Carolina National Guard, and a private therein who has taken the prescribed oath is an employee of the State within the meaning of the Workmen's Compensation Act, and where he has sustained an injury arising out of and in the course of the performance of his duties as an enlisted man he is entitled to the compensation prescribed by the statute. N. C. Const., Art. XII, sec. 2; C. S., 6821, 6823, 6864, 6889.

BAKER v. STATE.

APPEAL by defendant from *Cowper, Special Judge*, at September Term, 1930, of *WAKE*, affirming an award of the Industrial Commission.

Joe Baker was a duly enlisted private in Battery A, 113th Field Artillery, North Carolina National Guard, and at the time of his injury, was regularly employed in executing the lawful commands of his superior officers and under the orders issued by the office of the Adjutant General of the North Carolina National Guard. At the time of the injury, he was cranking a tractor in connection with his duties as a member of the maintenance section of the battery. The engine "kicked" and the crank struck his right kneecap, chipping off a part of the bone. As an enlisted man in Battery A, the plaintiff received from the State fifty cents (50c) per drill, and was required to drill by the State of North Carolina once a week, the drill night being designated as Monday night of each week, from eight to nine-thirty p.m. For the same drill period the Federal Government paid one dollar a drill. At the time of the injury, the plaintiff was employed in a cafe in Greenville, North Carolina, at a salary of \$20.00 per week, and board and lodging.

The plaintiff took the following oath of enlistment: "I do hereby acknowledge to have voluntarily enlisted this 26 August, 1927, as a soldier in the National Guard of the United States and of the State of North Carolina, for a period of three years, under the conditions prescribed by law, unless sooner discharged by proper authority, and I do agree to accept from the United States and the State of North Carolina such pay, rations, and clothing or other allowances as are or may be established by law; and I do solemnly swear that I will bear true faith and allegiance to the United States of America and the State of North Carolina, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the State of North Carolina, and of the officers appointed over me according to law and the rules of war."

The Industrial Commission found the facts to be as follows:

1. That the State of North Carolina has, by legislative enactment, waived its sovereign rights and its exemption of liability in so far as these rights and exemptions apply to injuries to its employees by accidents that arise out of and in the course of their employment; that neither the State nor its employees may reject the act and that the State is a self-insurer of its compensation liability.

2. That the plaintiff was a regular and duly enlisted militiaman of Battery A, 113th Field Artillery, North Carolina National Guard, and as such was an employee of the State when engaged upon the regular duties of his employment as a member of the National Guard of the State.

BAKER v. STATE.

3. That on 10 February, 1930, while engaged upon his duties as National Guardsman, the plaintiff sustained an injury by accident that arose out of and in the course of his employment; and that the plaintiff at the time of the hearing was disabled as a result of such injuries, which have not assumed a permanent status.

4. The plaintiff's average weekly wage paid by the State of North Carolina for service as a militiaman was fifty cents (50c) and his average weekly wage paid by the Federal Government was \$1.00, and that the average weekly wage earned in civilian employment was \$27.00.

5. That the employment was not casual, but was in the usual course of the business of the State.

Upon the foregoing facts the Industrial Commission awarded compensation to the plaintiff and the defendant appealed to the Superior Court and on appeal the award was affirmed. The defendant then appealed to the Supreme Court upon assigned error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State, appellant.

J. C. Lanier and W. T. Joyner for appellee.

ADAMS, J. At the time of his injury the plaintiff was an enlisted private in the North Carolina National Guard. In determining his legal relation to the State we may observe that the National Guard is an organization of the State militia, which does not become a part of the United States Army until the Congress declares an emergency to exist which calls for its services in behalf of the nation. *Bianco v. Austin*, 204 App. Div. (N. Y.), 34; *S. v. Johnson*, 202 N. W. (Wis.), 191; 32 U. S. C. A., sec. 1, *et seq.*; U. S. Compiled Sts., Supplement, 1925, sec. 1715a, *et seq.*; N. C. Code, 1927, sec. 6808, *et seq.* The National Guard being a State institution or agency, the decisive question is whether the plaintiff was an employee of the State and as such entitled to an award under the Workmen's Compensation Law. P. L., 1929, ch. 120.

The word "employment," as used in this act, includes employment by the State and all its political subdivisions. Section 2(a). The word "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, and as to those employed by the State all officers and employees of the State except such as are elected by the people or the General Assembly or are appointed by the Governor.

In *Moore v. State of North Carolina*, *post*, 300, we said that the phrase, "engaged in an employment under any appointment or con-

BAKER v. STATE.

tract of hire," embodies the two notions of an employment under an appointment and an employment under a contract of hire. It is contended by the appellant that a contract of hire imports a contractual relation or an agreement to labor for a stipulated wage or compensation, and that to give effect to this phrase it is necessary to show that the relation of master and servant must have been established in accordance with recognized legal standards.

It may not be amiss to examine some of the cases cited in the appellant's brief in support of this position. In *Sibley v. State*, L. R. A., 1916-C 1087, the Connecticut Supreme Court of Errors held that a duly elected sheriff while performing the duties of his office was not working under a contract with the State, the statutory definition of "employee" in that commonwealth being "any person who has entered into or works under any contract of service or apprenticeship with any employer." In *Hillestad v. Industrial Insurance Commission*, 141 Pac. (Wash.), 913, Ann. Cas., 1916-B 789, the question was whether a boy under the age of fourteen years had been employed by the respondents who owned and operated a shingle mill, and the Court said that under the statute in effect the law contemplated that the relation between the employer and the employee should possess some element of certainty. The opinion delivered in *Hinds v. Department of Labor and Industries*, 62 A. L. R. (Wash.), 225, declares that an air pilot associated with the owner of an airplane and flying field, who takes up passengers and receives a percentage of the gross compensation from flights, is a workman within the meaning of a statute which recognizes that the relation of employer and employee may exist, even though payment may be piecemeal or an allowance in the way of profit sharing. These and other cited cases are illustrative but are not conclusive in the case before us. Unquestionably an agreement between master and servant for the payment of a fixed wage for the performance of work may be a contract of hire, but are these the only conditions under which the relation of employer and employee may exist as contemplated by the Compensation Law? We think not. It has been held that a person who is procured by an employee to act as his substitute, or to assist him in his duties, the employer assenting, occupies the position of an employee, *Carter v. Woods Bros. Const. Co.*, 244 Pac. (Kan.), 1; that an employee "loaned" by one company to and subject to the control of another, is a temporary employee of the latter, though the wages are not fixed, *Tarr v. Hecla Coal & Coke Co.*, 109 At. (Pa.), 224, *Sgattone v. Mulholland*, 58 A. L. R. (Pa.), 1463; and that an agreement between two farmers for mutual assistance in filling their silos and ice houses, although their compensation was working one for the other, is a contract of service and employment. *Smith v. Jones*, 43 A. L. R. (Conn.), 952.

BAKER v. STATE.

These and similar decisions accord with the theory that the compensation act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." *Johnson v. Hosiery Co.*, 199 N. C., 38. So, it seems to have been assumed or conceded that, under the provisions of an act analogous to ours, a member of the National Guard injured while at target practice, if at the time in the service of the State and not of the United States, was entitled to compensation from the State under the Wisconsin Workmen's Compensation Act, and being in the service of the State he was given compensation. *S. v. Johnson, supra*. See *Rector v. Cherry Valley Timber Co.*, 13 A. L. R., 1247, in which it was held that whether the plaintiff entered the army voluntarily or was drafted, his presence there must be viewed as a voluntary service in the performance of a duty he owed the government.

Two facts may be regarded as established: the plaintiff when injured was in the service of the State and his service was voluntary. Was his status contractual? It is provided by statute that enlisted men shall not be recognized as members of the National Guard until they shall have signed an "enlistment contract" and taken an oath of enlistment. The General Assembly shall provide for paying the militia when called into active service. Constitution, Art. XII, sec. 2. The contract of service is one made under the conditions prescribed by law. C. S., 6821. Discipline must conform to the system prescribed for the regular army, and training to the provisions of an act of the Congress. C. S., 6823. The State furnishes enlisted men with uniform and equipment, pays them when called into the service of the State or in aid of the civil authorities, and provides compensation for each armory drill. C. S., 6824, 6864, 6889. Whether such remuneration may or may not be adequate is immaterial. That the "enlistment contract" is binding seems generally to be granted. *United States v. Grimley*, 137 U. S., 147, 34 L. Ed., 636; *In re Morrissey, ibid.*, 157, 34 L. Ed., 644; *S. v. Long*, 66 So. (La.), 375; *Acker v. Bell*, 57 So. (Fla.), 356. The record shows, in any event, that the plaintiff was voluntarily in the service of the State and subject to its direction and control. This is one of the tests of employment; and under the liberal interpretation given to the Compensation Law we should hesitate to hold that there can be no employment within the meaning of the act unless there happens to exist the technical relation of master and servant.

By waiving the immunity of the State with respect to all its officers and employees, excepting those specifically excluded, did not the General Assembly intend to make provision for their compensation when injured in the service contemplated in their contract of enlistment? In their brief the Attorney-General and his assistant intimate that sound policy

STEPP v. STEPP.

may warrant the State's assumption of this burden, but they do not agree that under the present law the burden has been assumed. After an examination of the authorities considered in view of the several compensation laws which they interpret we are of opinion that the plaintiff's case is within the provisions of the act in question and that the judgment of the Superior Court should be affirmed.

Affirmed.

D. E. STEPP v. EMMETT STEPP, ELMER STEPP AND JEANETTE STEPP SMITH.

(Filed 27 January, 1931.)

1. Life Estates C a—Life tenant may maintain action for sale of interests for reinvestment.

Under the amendment to C. S., 1744, the right of those having a contingent remainder in lands to have the lands sold for reinvestment is extended to the life tenant, who may do so without the joinder of the vested remaindermen (chapter 124, Public Laws of 1927), and *held*: where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold, the demurrer of the vested remaindermen is improperly sustained, although the life tenant is not entitled to the specific relief prayed for, the complaint alleging at least one good cause of action.

2. Pleadings D a—Where complaint alleges sufficiently one good cause of action a demurrer thereto should not be sustained.

Where one of several of the causes of action alleged in the complaint is good a demurrer thereto for insufficiency to state a cause of action is bad.

APPEAL by plaintiff from *Schenck, J.*, at May-June Term, 1930, of HENDERSON. Reversed.*

The plaintiff alleges that he is the owner of a life estate in a certain lot in the city of Hendersonville, N. C., describing same:

"That the defendants, Emmett Stepp, Elmer Stepp and Jeanette Stepp Smith, are of the age of 21 years, and in common own the remainder, or reversionary interest in the land. That the said land is subject to both city and county taxes, and the combined rate of taxation exceeding 4 per cent upon the assessed value of \$5,500; that the said property has a large street frontage on two streets, and is subject to the payment within the next few years of paying assessments in the sum of about \$2,500; that said lands are unproductive, and produce no income with which to pay the taxes and upkeep of same. That this action is

STEPP v. STEPP.

brought for the purpose of having the court decree a sale of said lands and premises, as provided by law. Wherefore, plaintiff prays judgment: First, that the court order a sale of said lands and premises, and that a commissioner be appointed to make said sale under the direction of the court; second, that the court order paid out of the proceeds of such sale absolutely to the plaintiff, the value of said plaintiff's share during his probable life, to be ascertained as now provided by law; that the remainder of said proceeds be paid over to, or reinvested for, the defendants, Emmett Stepp, Elmer Stepp and Jeanette Stepp Smith; third, that the cost of this proceeding be paid out of the proceeds of said sale; fourth, for such other and further relief as the plaintiff may be entitled to under the facts and circumstances of this case, and as to this honorable court may seem mete and proper."

The defendants demurred to the complaint on the ground: "That said complaint fails to state a cause of action against these defendants, or any of them; for that said complaint alleges that the estate of the plaintiff in the land and premises in respect of which relief is sought in said complaint, is a life estate only, and it is not alleged in said complaint, either that there is a contingent remainder over to persons who are not in being, or that there was or is any contingency which has not yet happened which will determine who the remaindermen are; and it further affirmatively appears from said complaint that all of the estates and interests in said property are vested interests."

The court below sustained the demurrer, plaintiff excepted, assigned error and appealed to the Supreme Court.

*Eubank, Whitmire & Weeks and Ray, Redden & Redden for plaintiff.
Shipman & Arledge and Carter & Carter for defendants.*

CLARKSON, J. The question involved: Can a life tenant of land which is unproductive and from which the income is insufficient to pay the taxes and reasonable upkeep of said land, maintain an action for sale of the same without the joinder of any of the vested remaindermen as parties plaintiff? We think so, under chapter 124, Public Laws 1927. The decision of this action depends upon the construction of certain statutes.

The last decision written by the learned former *Chief Justice Walter Clark*, of this Court, was *Ray v. Poole*, 187 N. C., 749, construing certain statutes in reference to the subject. It is there said, at pp. 752-3, quoting from 30 Cyc., 182: "A cotenant of an estate in possession less than in fee, although entitled to partition, cannot by his partition affect an estate in reversion or a remainder unless authorized to do so by statute," citing to that effect among other cases *Simpson v. Wallace*, 83

STEPP v. STEPP.

N. C., 477, and *Williams v. Hassell*, 74 N. C., 434, which last has been cited in many cases since. See Anno. Ed. And while the act of 1887, now C. S., 3234 and 3235, has authorized a sale at the instance of the remaindermen, or between the life tenants, there is, as above said, no authority by which the life tenant can 'freeze out' the children or other tenants in reversion or remainder. *Gillespie v. Allison*, 115 N. C., 542, and *In re Inheritance Tax*, 172 N. C., 174." This decision was filed 21 May, 1924. *Smith v. Suitt*, 199 N. C., 5.

In Vol. 3, C. S., 1744, under "Estates," we find "*Remainders to uncertain persons; procedure for sale; proceeds secured*. In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the Superior Court, which proceeding shall be conducted in a manner pointed out in this section. . . . The court shall, if the interest of all parties require or would be materially enhanced, by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold," etc.

In reference to the above statute, in *Pendleton v. Williams*, 175 N. C., at p. 252, we find: "It is very generally recognized that statutes of this kind, being no interference with the essential rights of ownership, but operating rather in addition to those already possessed by the owner of such estates, are well within the legislative powers. Lawson's Rights and Remedies, sec. 3867. And the act we are presently considering has been repeatedly approved and applied by decisions of this Court, the law being construed to authorize a sale of the property or the portion of it affected by the contingent interest and not a sale of the contingent interest separately. *Smith v. Witter*, 174 N. C., 616; *Smith v. Miller*, 151 N. C., 620; *Anderson v. Wilkins*, 142 N. C., 154; *Hodges v. Lipscomb*, 133 N. C., 199; *Springs v. Scott*, 132 N. C., 548; where the subject of these sales is very fully discussed by our former Associate Justice Connor. And it may be well to note that this later decision of *Hodges v. Lipscomb* was in reversal of a previous decision in the same case, 128 N. C., 57, additional parties having been made in accord with the Court's suggestion, so as to bring the later case within the provisions of the statute referred to."

In *Middleton v. Rigsbee*, 179 N. C., at p. 440, is the following: "And in a well considered case of *Gavin v. Curtin*, 171 Ill., 640, the doctrine was extended to the case of a life tenant and ulterior remainder-

STEPP v. STEPP.

man on contingency of a common-law estate where it was made to appear that a piece of property in the city of Chicago, valuable but unproductive, by reason of accumulating taxes and charges upon it, would be entirely lost to the owners unless a sale could be made—the principle ruling in the case being stated as follows: ‘Upon a bill of a life tenant equity may appoint trustees to take the fee in the property, sell the same, reinvest the proceeds for the benefit of the life tenant and the remainderman, where it appears that unless equity interferes the property will be lost to both life tenant and remainderman.’ The position is put beyond question in the present case, this being a proceeding under section 1590 of the Revisal (C. S., 1744), authorizing a sale of property affected by certain contingencies, and the statute making express provision to the effect that when the interest of all the parties would be materially enhanced by it, a sale may be had of the property or any portion for reinvestment either in purchasing or improving real estate. And the Court having held that by correct interpretation the statute authorizes, in proper instances, a sale of a part of the property for the preservation and improvement of the remainder. *Smith v. Miller*, 158 N. C., 99, and same case, 151 N. C., 620.”

After the decision in the *Ray case*, *supra*, the General Assembly passed the following: Chapter 124, Public Laws 1927. “An act to amend chapter 34, section 1744 of volume three, of the Consolidated Statutes, governing the sale of lands for reinvestment, etc.” “That any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property and reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not *sui juris* are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interest.”

It will be noted that the above amendment says that in certain particular cases where “*lands which are unproductive and from which the income is insufficient to pay the taxes and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff,*” etc.

This amendment, where the land is unproductive, etc., extends the right of action to include life estates where there are vested remaindermen and reversioners without their joinder. The section 1744 which is amended, theretofore had reference only to contingent remainders. Un-

ROBERSON v. MATTHEWS; MATTHEWS v. ROBERSON.

der C. S., 3235, *Ray v. Poole, supra*, and *Smith v. Suitt, supra*, this could not be done.

The language in the amendment of 1927, which amended C. S., 1744, is clear and unmistakable. We must give it force and effect. The allegations of the complaint come fully within this amendment, which we cannot ignore. The policy is for the General Assembly and not for us.

It may be further noted that C. S., 1744 says: "And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided."

The amendment says "*reinvestment* of the funds under the provisions of this section." This amendment does not seem to permit the life tenant to "cash in" although this is prayed for in the complaint.

"The complaint is not demurrable unless it is wholly insufficient. If a demurrer interposed to a whole complaint and any one of the causes of action is good the demurrer will be overruled." *Smith v. Suitt*, 199 N. C., at p. 9.

The order sustaining the demurrer in the court below must be Reversed.

C. ARTHUR ROBERSON v. N. D. MATTHEWS AND NORTH CAROLINA JOINT STOCK LAND BANK AND N. D. MATTHEWS v. C. ARTHUR ROBERSON AND B. R. JENKINS, TRUSTEE.*

(Filed 27 January, 1931.)

1. Mortgages H p—Inadequacy for purchase price alone is insufficient ground for setting aside foreclosure sale.

Where a deed of trust has been foreclosed by the trustee in conformity with the power of sale, and the sale accordingly made is sought to be set aside in equity for fraud, inadequacy of the purchase price must be coupled with some other inequitable element to be sufficient, and mere inadequacy of purchase price standing alone is insufficient to entitle the plaintiff to the relief sought.

2. Same—C. S., 2594(5), has no application to mortgages given prior to passage of the act, and is not ground for setting aside a foreclosure of a mortgage given prior thereto.

C. S., 2594(5) has no application to mortgages given prior to its passage and it does not operate to wipe out a valid debt existing at the

ROBERSON *v.* MATTHEWS; MATTHEWS *v.* ROBERSON.

time it became effective, and it is not a ground for setting aside a foreclosure of a mortgage given before the passage of the act in an action by a subsequent mortgagee.

3. Same—Evidence of whether purchaser at sale was agent for trustee held for jury in action to set aside foreclosure sale.

Where one acting for the trustee in a deed of trust becomes the purchaser for the trustee, equity has the power to set the sale aside, and where there is evidence thereof in a suit to set aside the foreclosure sale the question is for the jury to decide as to the fact of such agency under proper instructions from the court.

CIVIL ACTION, before *Moore, Special Judge*, at April Term, 1930, of MARTIN.

The evidence tended to show that prior to 2 August, 1901, J. W. H. Coburn owned certain land in Martin County. On 2 August, 1901, Coburn and wife executed a deed of trust on approximately 112 acres of land to B. R. Jenkins, trustee, for L. E. Ricks, to secure the payment of a note of \$500.00, payable 1 January, 1902. Thereafter, on 29 January, 1923, J. W. H. Coburn and wife executed and delivered to the First National Trust Company, trustee for the North Carolina Joint Stock Land Bank, a deed of trust to secure a note for \$6,600 held by said Land Bank. This deed of trust covered 212.4 acres of land and included the 112 acres above referred to, covered by the Jenkins deed of trust. Default was made in the payment of the Lank Bank note, and said land was duly sold and a deed was made by the First National Trust Company, trustee, to the North Carolina Joint Stock Land Bank for said 212.4 acres of land. Said deed was dated 20 April, 1927, and recorded 16 May, 1927. Subsequently the North Carolina Joint Stock Land Bank sold the property to N. D. Matthews by deed dated 29 September, 1927. On 15 November, 1927, Jenkins, trustee in the first deed of trust, dated 1901, advertised for sale under said deed of trust the 112 acre tract, and a deed was made by B. R. Jenkins, trustee, to C. Arthur Roberson. This deed from Jenkins, trustee, recites that the land was sold on 21 December, 1927, and Roberson became the last and highest bidder for the same at the price of \$300.

Hence, we have this situation: Matthews claims 212.4 acres of land by virtue of deed from the North Carolina Joint Stock Land Bank, and Roberson claims 112 acres of the same land by virtue of deed from Jenkins, trustee, to him. Matthews was in possession of the land, and on 8 January, 1929, Roberson instituted a suit against Matthews and the Joint Stock Land Bank, alleging that he was the owner of 112 acres of the land, and that Matthews was in the wrongful possession thereof. On 23 January, 1929, Matthews and the North Carolina Joint Stock Land Bank instituted suit against Roberson and Jenkins,

ROBERSON *v.* MATTHEWS; MATTHEWS *v.* ROBERSON.

trustee, alleging that the purported sale of the land by Jenkins, trustee, under power contained in the deed of trust of 1901, was irregular and void in that the purchase price paid by Roberson was grossly inadequate, and that in fact Roberson was acting as agent for Jenkins, trustee, at the time of the sale. The evidence produced at the trial tended to show that the note given by Coburn to Ricks in 1901 was sold by Ricks to Jenkins, trustee, in said deed of trust, and that Jenkins held the note and received payments thereon from time to time made by the mortgagor. The note was a sealed instrument and the last payment was made on 13 October, 1922. On 12 November, 1927, Jenkins, trustee, owner and holder of the note, transferred the same to C. Arthur Roberson, the plaintiff in the first suit. Three days thereafter, to wit, on 15 November, 1927, Jenkins, trustee, proceeded to advertise the land under the deed of trust of 1901. Matthews and the Land Bank were notified of the sale. There was also evidence tending to show that the land in controversy was worth from \$2,500 to \$4,000.

Roberson, the plaintiff in the first suit, was related by marriage to Jenkins, the trustee. Roberson testified: "In his old age he got me to look after some of his business affairs for him. Mr. Jenkins' financial condition was pretty good. . . . I saw an attorney at the time the note was transferred. We saw attorneys in regard to that. I did not especially want the note. The proposition of transfer was made to help Mr. Jenkins straighten out his business. I do not remember our attorney telling us it would be necessary to get the note in the hands of some one else before Mr. Jenkins could advertise and sell. Mr. Jenkins was getting old and was not able to straighten it out—disabled to look after it. . . . The transfer was made just to help him straighten out his business—to help him settle up his affairs." Roberson further testified that he paid \$490 to Jenkins for the note. It seems that Jenkins died pending the litigation because Roberson testified that he did not pay cash to Jenkins but gave him a note. He testified further: "The note I gave him was found among his papers and came into my hands marked already paid as far as I can tell."

There was also evidence that Coburn, the mortgagor, sold 38 acres of the land covered by the deed of trust of 1901 to one Vanorthwick. The Vanorthwick deed was dated 5 January, 1920. Another tract of said land, containing about 22 acres, was sold by Coburn to one Roebuck. Roberson released the Vanorthwick tract by a quitclaim deed upon the payment of a certain amount on the note.

The following issues were submitted to the jury:

1. "Is the note made by J. W. H. Coburn to L. A. Ricks, held by C. Arthur Roberson, barred by the ten-year statute of limitations?"

ROBERSON *v.* MATTHEWS; MATTHEWS *v.* ROBERSON.

2. "Is said note and deed of trust securing same, being the deed of trust recorded in Book CCC, page 580, conclusively presumed to have been paid so far as N. D. Matthews' lands are concerned by virtue of C. S., 2594(5)?"

3. "Did C. Arthur Roberson, in releasing lands of Vanorthwick release all other land embraced in deed of trust under which he claims?"

4. "What is balance due, if any, on note from J. W. H. Coburn to Ricks, now held by C. Arthur Roberson?"

The judge instructed the jury to answer the first issue "No"; the second issue "No"; the third issue "No"; the fourth issue "\$371.75 with interest from 21 November, 1927."

The pertinent portion of the judgment is as follows:

"It is now upon motion considered and adjudged by the court that the deed from B. R. Jenkins, trustee, to C. Arthur Roberson . . . be canceled of record. It is further adjudged that the foreclosure sale conducted by B. R. Jenkins, trustee, on 21 December, 1927, is void and of no effect, and it is, therefore, considered and adjudged by the court that there is a balance due on the note from J. W. H. Coburn to L. A. Ricks, said note being now held by C. Arthur Roberson, the sum of \$371.75 with interest thereon from 21 November, 1927, and it is further adjudged that said amount constitutes a lien upon all the lands described in the deed of trust from J. W. H. Coburn and wife to B. R. Jenkins, trustee for L. A. Ricks."

From the foregoing judgment both parties appealed.

L. A. Critcher and J. C. Smith for Roberson.

A. R. Dunning and W. G. Mordecai for N. D. Matthews and North Carolina Joint Stock Land Bank.

BROGDEN, J. Did the trial judge rule correctly in setting aside the sale by Jenkins, trustee, to Roberson, and the deed made pursuant thereto?

There is no evidence that there was any actual fraud, oppression, or unfairness in advertising and selling the land. Moreover, the sale was properly advertised and the deed of trust empowered the trustee to appoint "a day and place of sale," etc. There was evidence that the note secured by the deed of trust had not been barred by the statute of limitation. Therefore, the power to set aside the sale and deed must be based upon one or all of three theories, to wit, (a) that the purchase price was so grossly inadequate as to shock the conscience of a court of equity; (b) the application of C. S., 2594, subsection 5; (c) that the purchaser Roberson was at the time of the sale, agent for the trustee and acting for said trustee in conducting the sale and taking title to the property.

ROBERSON v. MATTHEWS; MATTHEWS v. ROBERSON.

The first theory cannot be maintained upon the evidence offered at the trial. Mere inadequacy of purchase price alone is not sufficient to upset a sale when duly and regularly made. "But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Weir v. Weir*, 196 N. C., 268, 145 S. E., 281.

Neither can the second theory be maintained. Indeed, the trial judge instructed the jury that C. S., 2594, did not apply. This ruling was correct. *Hicks v. Kearney*, 189 N. C., 316, 127 S. E., 205. That decision declares the law to be that C. S., 2594, subsection 5, has no application to a mortgage given prior to the passage of that statute nor does it wipe out a valid debt existing at the time the statute took effect.

The third theory presents the real question upon this record. The trustee was the owner and holder of the note secured by the deed of trust. Said trustee transferred the note to a kinsman by marriage, and three days thereafter the land is advertised for sale. The purchaser, Roberson, testified that "the purpose of the transfer was made to help Mr. Jenkins (trustee) straighten out his business. . . . Mr. Jenkins was getting old and wasn't able to straighten it out, disabled to look after it. . . . I saw Mr. Jenkins right often. In his old age he got me to look after some of his business affairs for him."

Upon this evidence and other evidence in the record, the question arises: Was Roberson, the purchaser, the agent of Jenkins, the trustee, in making the sale, and thereafter acquiring title to the property pursuant to such sale? The general principle pertinent to this phase of the case was thus expressed by *Hoke, J.*, in *Owens v. Mfg. Co.*, 168 N. C., 397, 84 S. E., 389: "In exercising such a right, however, the utmost degree of good faith is required, the mortgagee being looked upon as a trustee for the owner as well as the creditor, and, in applying the principle, it is very generally held that such a mortgagee is not allowed, either directly or indirectly, to become the purchaser at his own sale, and where this is made to appear the transaction, as between the parties and at the election of the mortgagor, is ineffective as a foreclosure, and the relationship of mortgagor and mortgagee will continue to exist. . . . Under well considered decisions here and elsewhere, the position extends to the case of assignees of the mortgage or the debt secured by it when it is shown that such an assignee, by himself, his agent or attorney, was in control and charge of the sale; the mortgagee only participating by allowing the use of his name for the purpose." *Joyner v. Farmer*, 78 N. C., 196; *Morris v. Carroll*, 171 N. C., 761, 88 S. E., 511; *Jessup v. Nixon*, 199 N. C., 122.

POTTS v. PAYNE.

An examination of the record discloses that the third theory was not submitted to the jury, and the question of agency upon the facts disclosed is essentially an issue of fact. If it shall be determined that Roberson, the purchaser, was acting as agent for the trustee, Jenkins, then a court of equity has the power to set aside the sale and the deed pursuant thereto.

Wherefore, the cause is remanded for further proceedings.

Reversed and remanded.

ETTA B. PAYNE POTTS v. LELA PAYNE, JAMES PAYNE AND HIS WIFE, ELLA PAYNE; G. W. PAYNE AND HIS WIFE, BETTY PAYNE; W. D. PAYNE AND HIS WIFE, ESTA PAYNE; ANNIE PAYNE, UNMARRIED; W. C. IDOL, TRUSTEE, AND WACHOVIA BANK AND TRUST COMPANY.

(Filed 27 January, 1931.)

1. Husband and Wife G a—Absolute divorce changes estate by entirety to tenancy in common.

The effect of an absolute divorce is to sever the title to lands held by the husband and wife in entirety, and they will hold the title as tenants in common.

2. Adverse Possession A h—Deed of wife to husband held under facts of this case to be color of title.

Where the wife for a monetary consideration has attempted to convey her estate by entirety to her husband, observing all the statutory requirements concerning a wife's conveyance to her husband, and thereafter an absolute divorce has been decreed, the wife's deed to her husband is color of title even if it be void, and his sufficient adverse possession for seven years, C. S., 428, will ripen the fee-simple title in him, and upon conflicting evidence a question is raised for the determination of the jury as to the length and character of the possession. C. S., 997, 2515, 3324.

APPEAL from *Schenck, J.*, and a jury, at August Term, 1930, of GUILFORD. New trial.

This is an action brought by plaintiff, former wife of P. L. Payne, who was married to him on 24 February, 1898 (they had no children and an absolute divorce between them was decreed in 1925), against the widow, second wife, of said Payne, and his heirs at law, for partition of certain real estate deeded to P. L. Payne and his wife the plaintiff—they holding the estate by entirety.

On 21 March, 1922, the plaintiff and her then husband P. L. Payne, signed under their respective hands and seals, certain paper-writings

POTTS v. PAYNE.

duly recorded. One of the paper-writings was a deed of separation, in which plaintiff received from P. L. Payne \$7,500, and certain articles of personal property, and plaintiff conveyed all of her right, title and interest to the lands in controversy held by the entirety to P. L. Payne and his heirs and assigns. Each also released to the other all rights by virtue of the marital relations existing between them. In said deed of separation is the following: "Whereas, the said parties for sometime past have lived separate and apart; and, Whereas, the said parties have agreed upon the signatures ensealing and delivery of these presents to continue to live separate and apart each from the other," etc. Plaintiff also by deed on the same day, after the execution of the deed of separation, for the consideration of \$7,500 and certain articles of personal property bargained, sold and conveyed to P. L. Payne and his heirs and assigns all her right, title and interest to the lands in controversy. In said deed is the following: "And the said P. L. Payne, party of the second part, by the signature to the deed of separation hereinbefore referred to, and by the acceptance of this deed of conveyance, has and does signify his assent in writing to the making of this conveyance, the signature to the said deed of separation having been made prior to the signature, ensealing and delivering of this deed . . . and the said Lou Etta Payne for herself, her heirs and personal representatives, covenants with the said P. L. Payne, his heirs and assigns, as follows: That the said Lou Etta Payne is seized in fee simple of an undivided one-half joint interest in and to the said lands and premises hereinbefore conveyed; that she, with the above recited written consent of her said husband, P. L. Payne, has good and lawful right to convey the same in fee simple; that the title to the said undivided one-half joint interest above conveyed is free and clear of all liens and encumbrances of whatsoever kind, and that the said Lou Etta Payne will, and her heirs and personal representatives shall, forever warrant and defend the above conveyed title to the said undivided one-half interest in and to the said lands and premises to him, the said P. L. Payne, his heirs and assigns, against the lawful claims of any and all persons whomsoever." Both these paper-writings show compliance with C. S., 997, 2515 and 3324.

In 1925, P. L. Payne secured a divorce absolute from plaintiff and thereafter plaintiff married in 1926 one J. Smith Potts. After the divorce P. L. Payne married Lela Payne, on 4 February, 1925, and died on 2 April, 1928, leaving his widow, Lela Payne, and the other defendants his heirs at law.

On 21 February, 1927, P. L. Payne and his then wife Lela Payne, encumbered the property in controversy for \$1,500 and made a deed in

POTTS v. PAYNE.

trust to W. C. Idol, trustee for Wachovia Bank and Trust Company, and the deed of trust was duly recorded.

Defendants in their answer, say: "That the defendants are the owners in fee of said lands; that they and their predecessor in title, P. L. Payne, have been in possession of said real property under known and visible lines and boundaries and under colorable title for more than 7 years, and that the plaintiff has failed to bring her action within the said period of 7 years, and the defendants plead the said 7 years statute of limitation, to wit, C. S., 428, as a perpetual bar against the petitioner."

The defendants introduced evidence to support the allegation that P. L. Payne immediately upon the deed being made to him by plaintiff went into the possession of the land in controversy and he and the defendants who claim under him have held same as set forth in their answer. This action was instituted on 25 July, 1929.

The charge of the court below was as follows: "Gentlemen of the jury: The issue that is submitted to you reads as follows: Is the plaintiff, Etta B. Payne Potts, the owner and entitled to the possession of an undivided one-half interest in the lands described in the complaint? The court charges you if you find the facts to be as shown by all the evidence, both oral and documentary, you will answer that issue Yes."

The judgment of the court below was as follows: "This cause coming on for trial at the August Term, 1930, of the Superior Court of Guilford County, before his Honor, Judge Michael Schenck, and a jury, and was tried upon the following issue, to wit: Is the plaintiff, Etta B. Payne Potts, the owner of and entitled to the possession of an undivided one-half interest in the land described in the complaint? And the jury answered the issue Yes. It is now, on motion of plaintiff's counsel, ordered, adjudged and decreed by the court that the plaintiff, Etta B. Payne Potts, is the owner of and entitled to the immediate possession of an undivided one-half interest in and to the following lands, being same described in the complaint (description set forth in the judgment). . . . And that the defendant, James Payne, G. W. Payne, W. D. Payne and Annie Payne, heirs at law of P. L. Payne, deceased, are the owners of the other undivided half, subject, however, to the dower rights of the defendant, Lela Payne, the present widow of the deceased, P. L. Payne, and that the plaintiff has a right to have partition of said lands by sale thereof as it is admitted in the answer that the same cannot be divided in kind without damage to the owner. It is further ordered, adjudged and decreed that the defendants have and recover of the plaintiffs the full sum of \$7,500 which she offered to restore, as set out in paragraph 4 of her reply, and that said \$7,500 shall be a lien upon her

POTTS v. PAYNE.

one-half undivided interest in the property above described, this to be operative as a judgment *in rem* against said one-half interest and not a *personam* against the plaintiff."

King, Sapp & King and D. H. Parsons for plaintiff.

T. W. Albertson, Frazier & Frazier and Gold, York & McAnally for defendants.

CLARKSON, J. Both plaintiff and defendants appealed and assigned errors to the judgment rendered by the court below (1) defendants appealed from the charge of the court below, and (2) plaintiff appealed from the judgment in the court below adjudging: "It is further ordered, adjudged and decreed that the defendants have and recover of the plaintiff the full sum of \$7,500 which she offered to restore, as set out in paragraph 4 of her reply, and that said \$7,500 shall be a lien upon her one-half undivided interest in the property above described." The charge of the court below held, in effect, (1) that the deed of separation and deed from plaintiff to her husband, P. L. Payne, for the land in controversy, held by the entirety by the husband and wife was void; (2) it was not color of title and after the decree for divorce absolute in 1925 the husband and wife held the land as tenants in common, and the plaintiff was entitled to one-half of the land in controversy, and the consideration paid by the husband to the wife was a charge on her half interest.

In *McKinnon v. Caulk*, 167 N. C., 411, it is held that a decree of absolute divorce destroys the unity of husband and wife, and therefore converts an estate by the entirety into a tenancy in common.

In *Freeman v. Belfer*, 173 N. C., 581, it is held by a majority decision that a divorce *a mensa et thoro* does not sever the marital relationship of husband and wife so as to make them tenants in common of lands held by them in entirety, or to effect a change in the doctrine of title by survivorship between them.

In the *Freeman case*, *supra*, Clark, C. J., and Brown, J., dissent, Brown, J., at p. 590, says: "I think it best to settle the matter by holding that when husband and wife are separated by decree *a mensa* they at once become tenants in common of property held in entirety."

In the case of *Kornegay v. Price*, 178 N. C., p. 441, is the following: "It seems to be well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. But where the marital relations have been terminated by divorce or abandonment, it seems that one may acquire title from the other by adverse possession. 1 A. & E., p. 820, sec. 11."

POTTS v. PAYNE.

It is well settled that if the husband abandons his wife she can convey her real estate without joinder of her husband. *Keys v. Tuten*, 199 N. C., 368. This Court has consistently held that a deed from a wife to her husband that does not comply with C. S., 2515 is void.

In *Capps v. Massey*, 199 N. C., at p. 198, citing numerous authorities, we find: "C. S., 2515, requiring the probate officer, as a condition precedent to the validity of the conveyance to certify in his certificate of probate that, at the time of its execution and the wife's privy examination, such contract was 'not unreasonable or injurious to her.' This having been omitted, in the instant case, the deed in question is void as to the plaintiff. . . . In *Whitten v. Peace*, *supra* (188 N. C.), at p. 302-3, we find 'This Court has held, in *Norwood v. Totten*, 166 N. C., 649, that a deed executed by a wife conveying land to her husband, void for failure of the probate officer to comply with C. S., 2515, is, nevertheless, color of title, and that adverse possession by the husband under such a deed for seven years will ripen into a perfect title."

We do not think it necessary to decide (1) whether the deed of separation between plaintiff and her former husband P. L. Payne, which conveyed for a consideration to P. L. Payne and his heirs and assigns, the property in controversy held by the entirety; (2) or the deed from plaintiff to P. L. Payne and his heirs and assigns conveying the said land, are valid. Both of said instruments, in reference to the execution by plaintiff, complied with statutes heretofore cited and were executed and delivered on 21 March, 1922, the deed of separation first and thereafter the deed which referred to the deed of separation. Conceding, but not deciding, that these instruments were void, yet, by analogy to the cases above quoted, they were at least color of title.

Defendant pleads C. S., 428, as follows: "When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under colorable title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability."

C. S., 408: "In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a *feme covert* during coverture prior to February thirteenth, one thousand eight hundred and ninety-nine." *Carter v. Reaves*, 167 N. C., 131; *Thomas v. Conyers*, 198 N. C., 229.

INSURANCE CO. v. GRIFFIN.

We think the evidence of adverse possession for seven years under color of title should have been submitted to the jury. From the position here taken, we do not think it necessary to pass on plaintiff's appeal.

For the reasons given, there must be a
New trial.

ÆTNA LIFE INSURANCE COMPANY v. JAMES CLINGMAN GRIFFIN
AND MAUDE GRIFFIN.

(Filed 27 January, 1931.)

1. Trial D a—Plaintiff may not take voluntary nonsuit over defendant's objection where answer sets up counterclaim.

Where the answer pleads a counterclaim the plaintiff may not take a voluntary nonsuit over the defendant's objection.

2. Pleadings C b—Definition of counterclaim.

Under the provisions of C. S., 521, a counterclaim is defined to be a claim existing in favor of the defendant arising out of contract or transaction alleged in the complaint as a foundation for the relief sought or a claim connected with the subject-matter of the action or other cause existing *ex contractu* at the commencement of the action, and subject to these limitations it includes practically every kind of cross-demand existing in the defendant's favor in the same right, either legal or equitable.

3. Same—In this case held: answer set up counterclaim and plaintiff could not take voluntary nonsuit over defendant's objection.

Where the plaintiff life insurance company brings action to cancel its policy for fraudulent statements inducing the plaintiff to reinstate the policy upon application of the defendant, and in the defendant's answer he alleges that he had refused the plaintiff's demand for the return of the policy because benefits under its disability clause had already accrued to him under the terms of the policy: *Held*, the answer sets up a counterclaim, though indefinitely stated, and the plaintiff's remedy is to apply, before answer or demurrer, to the court to require the defendant to make his allegations more definite, and the plaintiff's motion for a voluntary nonsuit over the defendant's objection is properly refused.

APPEAL by plaintiff from *Moore, J.*, at March Term, 1930, of UNION.
Affirmed.

The complaint and amended complaint and answer and amended answer—briefly: James Clingman Griffin took out a policy of insurance on his life for \$5,000, payable to his wife Maude Griffin. It is alleged by plaintiff that it lapsed on account of the failure to pay the premium. James Clingman Griffin made application for reinstatement of the policy

INSURANCE CO. *v.* GRIFFIN.

and in the application made false and fraudulent representations of a material nature as to his health, which under the terms of the policy made it null and void. Plaintiff tendered the premiums back and prayed that the policy be canceled. That the premiums paid for reinstatement were accepted by plaintiff without knowledge of the falsity of the statements in application for reinstatement. The defendant James Clingman Griffin denied that he failed to pay the premium as provided in the policy and that it became null and void and subject to reinstatement as provided in the policy. That if he signed any paper-writing for reinstatement of the policy, that the facts in reference to his condition of health were well known to plaintiff's agent. That the policy was reinstated and plaintiff's agent accepted the premium with full knowledge of all the facts and circumstances and plaintiff had ample time before accepting premium to investigate defendant, James Clingman Griffin's state of health. That the policy has been at all times in the possession of defendants and at the time it was reinstated. Defendants set up the defense of waiver and estoppel.

Defendants further say: "It is admitted that on or about 25 November, 1929, the plaintiff tendered to the defendant, James Clingman Griffin, the sum of \$77.69, with interest thereon from 23 April, 1928, and the sum of \$76.65 with interest thereon from 30 November, 1928, and demanded the return of said policy for cancellation and the defendant, James Clingman Griffin, refused to accept the amounts tendered and refused to deliver the said policy to the plaintiff for cancellation, because at that time and while the said policy was in full force and effect the said James Clingman Griffin had become totally and permanently disabled, as the plaintiff well knew, whereby the said defendant has become entitled to certain rights and benefits under said policy which the plaintiff is attempting to avoid payment of in this action."

The plaintiff demurred to the defendants' amended answer, as to the allegations of section 18, on the ground that "If the allegations of said section are intended to set up a counterclaim or to set up some ground for affirmative relief or some right or benefit to the defendant under the policy of insurance referred to in the complaint filed herein, the allegations contained in said section are insufficient for such purpose, in that they fail to state the nature of such counterclaim, or the nature of the rights and benefits claimed under said policy and are so indefinite and uncertain that this plaintiff is unable to make reply thereto."

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, Walter E. Moore, judge presiding, at the March Term, 1930, of the Superior Court of Union County on motion of plaintiff for continuance upon the ground that counsel of

INSURANCE CO. v. GRIFFIN.

record for plaintiff, Murray Allen, Esq., is engaged in the trial of an action in the Superior Court of Nash County, and upon that ground that plaintiff is not prepared for trial upon the merits, and upon motion of plaintiff for judgment of voluntary nonsuit, and upon plaintiff's demurrer to section 18 of defendants' amended answer, it is hereupon ordered and adjudged: (1) That plaintiff's motion for continuance be, and the same is hereby overruled and denied. (2) That plaintiff's motion for judgment of voluntary nonsuit be, and the same is hereby overruled and denied. (3) That plaintiff's demurrer to section 18 of the defendants' amended answer be, and the same is hereby overruled and denied."

The plaintiff excepted to the judgment, assigned error and appealed to the Supreme Court.

Murray Allen and R. Pearson Upchurch for plaintiff.

Vann & Milliken for defendants.

CLARKSON, J. The questions involved: (1) Did the trial court err in overruling the plaintiff's demurrer to section 18 of defendants' amended answer? (2) Did the trial court err in refusing to permit plaintiff to take a voluntary nonsuit? We think not.

This brings us to consider what is a counterclaim. C. S., 521: "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

Subject to the limitations expressed in the above section, a counterclaim includes practically every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than setoff, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured on the same state of facts. *Smith v. French*, 141 N. C., at p. 7.

In *Roper Lumber Co. v. Wallace*, 93 N. C., at p. 28, speaking to the subject: "The defendants' answer is informal, but it in substance and effect denies, *first*, that the plaintiffs are the owners of the land, and that they trespassed upon the same as alleged in the complaint, and

INSURANCE CO. v. GRIFFIN.

they also deny most of the other material allegations. They thus put the plaintiffs to prove their title and establish their cause of action. With this they might have stopped. But they did not simply make defense, and thus put in issue the plaintiffs' alleged rights—they alleged that they were the owners of the land—that the plaintiffs were trespassers in possession of it, cutting and removing the timber from it, for which it was mainly valuable, and were continuing to cut and remove it, etc. The plaintiffs denied that the defendants had title; they denied the alleged trespass, and they put them to prove title, and establish their cause of action. In our judgment, the defendants thus alleged a counterclaim."

In an action for the specific recovery of a horse, the defendant pleaded as a counterclaim, that the plaintiff sold the horse to the defendant, and, at the time of the sale, warranted that it was sound, which warranty was false, and in consequence of which the defendant had been damaged; *Held*: that the counterclaim arose out of the transaction set out in the complaint and was properly pleaded as a counterclaim. *Wilson v. Hughes*, 94 N. C., 182.

The rule is thus stated by *Allen, J.*, in the case of *Yellowday v. Perkinson*, 167 N. C., at p. 147: "These authorities establish the proposition that the plaintiff has no right to submit to a judgment of nonsuit without the consent of the defendant, and dismiss the action, if a counterclaim is pleaded, and that when facts are alleged which would entitle the defendant to maintain a separate action against the plaintiff, legal or equitable, they amount to a counterclaim."

C. S., 506, in reference to what the complaint must contain, says: "(2) A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered."

In C. S., 535, we find: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

It goes without saying that the counterclaim set up must contain a plain and concise statement of the facts constituting same without unnecessary repetition.

In the amended answer is the following: "James Clingman Griffin, refused to accept the amounts tendered and refused to deliver the said policy to the plaintiff for cancellation, because at that time and while the said policy was in full force and effect the said James Clingman Griffin had become totally and permanently disabled, as the plaintiff well knew, whereby the said defendant has become entitled to certain rights and benefits under said policy which the plaintiff is attempting to avoid payment of in this action."

LATTA v. JENKINS.

We think that the defense that defendants were "striking at" if sufficiently pleaded would constitute such a counterclaim that plaintiff could not take a voluntary nonsuit. Plaintiff demurs on the ground that the allegations are "insufficient for such purpose."

C. S., 537, is as follows: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

"When a good cause of action is set out, but defective in form the court may require the pleadings to be made definite and certain by amendment." *Allen v. R. R.*, 120 N. C., at p. 550; *Bristol v. R. R.*, 175 N. C., 509; *Barbee v. Davis*, 187 N. C., at p. 82; *Power Co. v. Elizabeth City*, 188 N. C., at p. 286; *Yonge v. Ins. Co.*, 199 N. C., at p. 18.

We think a counterclaim was pleaded, but indefinite and uncertain. The plaintiff should have made a motion to make the pleadings more definite and certain. A demurrer was not proper. The facts set forth by defendants constitute a counterclaim and the court below was correct in not granting plaintiff's motion for voluntary nonsuit. Plaintiff will have the right to move in the court below to require defendants to make their amended answer more definite and certain.

For the reasons given, the judgment is
Affirmed.

E. D. LATTA, JR., EXECUTOR AND TRUSTEE OF THE WILL OF E. D. LATTA, DECEASED, v. L. L. JENKINS, TREASURER, AND BUNCOMBE COUNTY.

(Filed 27 January, 1931.)

1. Taxation B d—Property held in trust for sale and distribution of part of proceeds to religious institutions held not exempt from taxation.

The mandate of the Constitution is clear and explicit that all real and personal property in this State shall be taxed by a uniform rule, allowing exemptions from taxation of Federal, State and municipal property and exemptions in the discretion of the Legislature in certain instances relating to religion, schools, charitable institutions, etc., and in cases allowing interpretation, the extent of the exemptions must be strictly construed in favor of the right to tax, and where in construing a devise of various property in a city the courts have decreed that the lands be sold within a period of five years and fifty-five per cent of the proceeds distributed among several beneficiaries of the class exempted by the Legislature, the

LATTA v. JENKINS.

property itself is not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of part of the proceeds of the sale to them, and *held*: the exemption does not apply except to the proceeds of the sale when received by the beneficiaries in accordance with the decree, and the lands in the hands of the trustee are subject to taxation. Const., Art. V, secs. 3 and 5.

2. Same—Doctrine of equitable conversion will not apply to exempt property from taxation.

There is no application of the doctrine of equitable conversion to the liability of property to taxation by the State or its political subdivisions, and property will not be exempted from taxation because the proceeds of sale thereof are to be used for religious purposes under the terms of a trust.

APPEAL by plaintiff from *MacRae*, *Special Judge*, at November Term, 1930, of BUNCOMBE. Affirmed.

This is an action to recover of defendants a sum of money paid by plaintiff, under protest, as taxes levied on property located in the city of Asheville, and assessed for taxation by Buncombe County for the year 1928. Prior to the commencement of the action, the plaintiff had fully complied with the provisions of section 464, chapter 80, Public Laws of North Carolina, 1927. C. S., 7880(189).

Plaintiff contends that the property on which the taxes were levied by Buncombe County for the year 1928, was exempt from taxation under the provisions of section 69, chapter 71, Public Laws of North Carolina, 1927, C. S., 7971(67), and that for this reason the sum of money paid by him to the defendants, under protest, should be refunded to him. Defendants contend to the contrary.

The action was heard on a statement of facts agreed. The court was of opinion that on these facts the property on which the taxes were levied by Buncombe County for the year 1928 was not exempt from taxation, and that plaintiff is not entitled to recover of the defendants in this action.

From judgment that plaintiff recover nothing in this action, plaintiff appealed to the Supreme Court.

Cansler & Cansler and Merrimon, Adams & Adams for plaintiff.
Don Young, George Pennell and Ward & Allen for defendants.

CONNOR, J. Plaintiff as trustee named in the will of his father, E. D. Latta, deceased, is the owner of certain property located in the city of Asheville, Buncombe County, North Carolina, and used for business purposes, which, unless exempted by the provisions of section 69, chapter 71, Public Laws 1927, of this State, was subject to taxation by Buncombe County for the year 1928. By virtue of the provisions of the will of

LATTA *v.* JENKINS.

E. D. Latta, deceased, which has been duly probated and recorded in Buncombe County, and of a judgment and decree in an action pending in the Superior Court of Mecklenburg County, at December Term, 1927, plaintiff holds title to said property in trust to sell the same, at any time within five years from the date of the judgment and decree, and to pay the net proceeds of said sale, as follows: 45 per cent of said net proceeds to the daughter of E. D. Latta, deceased, who is the beneficiary of a trust established by his will; and 55 per cent of said net proceeds to the trustees of the General Assembly of the Presbyterian Church in the United States and the Presbyterian Foundation, Inc., the Asheville Mission Hospital, and the North Carolina Orthopedic Hospital, who are also beneficiaries of certain trusts established by the will of E. D. Latta, deceased. When their proportions of the proceeds of the sale of said property shall have been paid to them by the plaintiff, in accordance with the provisions of said judgment and decree, these last named beneficiaries will hold and use the same exclusively for religious, charitable and educational purposes, in accordance with the will of E. D. Latta, deceased, and the judgment and decree of the Superior Court of Mecklenburg County.

Prior to the year 1928, the plaintiff listed all the property owned by him as trustee under the will of his father, E. D. Latta, deceased, who died in 1925, for taxation, and paid the taxes levied on said property by Buncombe County. After the rendition of the judgment and decree in the action pending in the Superior Court of Mecklenburg County, at December Term, 1927, upon the advice of counsel, plaintiff listed for taxation for the year 1928, only 45 per cent of the assessed value of said property, and declined to list 55 per cent of the said assessed value, contending that said 55 per cent was exempt from taxation under the provisions of section 69, chapter 71, Public Laws 1927, of this State, for that said 55 per cent of the assessed value of said property was held by him in trust exclusively for religious, charitable and educational purposes. Thereafter, the board of commissioners of Buncombe County caused the said 55 per cent of the assessed value of the property located in the city of Asheville, and owned by the plaintiff as trustee, to be listed for taxation for the year 1928. Upon demand of said board of commissioners, and after protest, the plaintiff paid to the tax collector of Buncombe County, the amount levied as taxes on said 55 per cent of the assessed value of said property, and thereafter instituted this action to recover said amount. On the statement of facts agreed, filed in the action when the same was called for trial, the only question presented for decision was whether the said 55 per cent of the assessed value of the property owned by plaintiff and held by him as trustee under the will of E. D. Latta, deceased, and under the judgment and

LATTA v. JENKINS.

decree of the Superior Court of Mecklenburg County, was exempt from taxation by Buncombe County for the year 1928. The answer to this question involves the construction of section 69, chapter 71, Public Laws 1927, of this State.

By virtue of the provisions of section 3 of Article V of the Constitution of North Carolina, all property, real and personal, in this State, is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held, unless exempted by or under the provisions of section 5 of said article. The provision of said section that property belonging to or owned by the State or municipal corporations, shall be exempt from taxation, is self-executing and requires no legislation to make it effective. *Town of Andrews v. Clay County*, *post*, 280. Under this section, the General Assembly may exempt property in this State held for educational, scientific, literary, charitable or religious purposes. The power of exemption thus conferred on the General Assembly by the Constitution, to be exercised in its legislative discretion, may be exercised to the full extent, or in part, or not at all, as the General Assembly may determine. The general rule established by the Constitution is that all property in this State is liable to taxation, and shall be taxed in accordance with a uniform rule. Exemption of specific property, because of its ownership by the State or by municipal corporations, or because of the purposes for which it is held and used, is exceptional. The mandatory constitutional provision that property belonging to or owned by the State or municipal corporations shall be exempt from taxation, is in language so clear and free from ambiguity that ordinarily there is no room for construction as to its application to specific property. *Southern Assembly v. Palmer*, 166 N. C., 75, 82 S. E., 18. Statutes enacted by the General Assembly exempting specific property from taxation, because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. *Trustees v. Avery County*, 184 N. C., 469, 114 S. E., 696; *United Brethren v. Commissioners*, 115 N. C., 489, 20 S. E., 626. Exemption of specific property from taxation because of the purposes for which it is held and used, is a privilege, which the General Assembly has the power to confer on its owner or owners, within the limitations of the Constitution of the State. In the absence of a clearly expressed intention on the part of the General Assembly to confer this privilege of exemption from taxation, with respect to specific property, such property is subject to taxation in accordance with the general rule that

LATTA v. JENKINS.

all property in this State is liable to taxation for the purpose of supporting the government of the State or of its political subdivisions.

The property owned by the plaintiff as trustee under the will of his father, E. D. Latta, deceased, during the year 1928, and held by him under the provisions of said will, with respect to certain trusts, made more specific by the terms of the judgment and decree of the Superior Court of Mecklenburg County, at December Term, 1927, consists of business property located in the city of Asheville. No part of said property was owned or occupied during the year 1928 by the beneficiaries of the trusts established by said will. Under the judgment and decree, these beneficiaries are entitled to certain percentages of the net proceeds of the sale of said property. The plaintiff is authorized and directed by the judgment and decree to sell said property at any time within five years from the date of the judgment and decree, and to pay to the said beneficiaries their proportionate parts of the net proceeds of said sale. None of said beneficiaries own or occupy said property or any part thereof, for religious, educational or charitable purposes. No part of said property was exempt from taxation under the provisions of section 69, chapter 71, Public Laws 1927, of this State, and there is no error in the judgment that plaintiff recover nothing in this action.

The instant case is distinguishable from *Bank v. Commissioners of Yancey County*, 195 N. C., 678, 143 S. E., 252. In that case, under the provisions of a judgment by consent of all parties interested in the assets of the estate of J. W. Higgins, deceased, certain religious, educational and charitable institutions were the owners of an undivided half interest in said assets, which consisted of notes in the hands of certain persons for collection. It was held that said one-half interest in said notes was exempt from taxation under the statute. In the instant case, the title to all the property on which taxes were levied by Buncombe County for the year 1928, was in the plaintiff, as trustee. The beneficiaries of the trusts had no right, title or interest in the property. They had the right only to certain percentages of the proceeds of the sale of the property, to be paid to them by the plaintiff after the sale of the property at any time within five years from the date of the judgment and decree of the Superior Court of Mecklenburg County, at December Term, 1927.

The doctrine of equitable conversion has no application in the instant case. This well established doctrine cannot be invoked to affect the liability of property to taxation by the State or by its political subdivisions. The judgment is

Affirmed.

BURNS *v.* TRUST CO.

A. M. BURNS, JR., TRUSTEE IN BANKRUPTCY OF M. RUBENSTEIN, *v.* WACHOVIA BANK AND TRUST COMPANY, S. RUBENSTEIN AND LAWRENCE RUBENSTEIN.

(Filed 27 January, 1931.)

1. **Bankruptcy C—Where creditor has no actual knowledge of insolvency nor of facts sufficient to put him on inquiry, payment will not be set aside.**

A payment upon a debt owed by an insolvent within the four months period specified in the Bankruptcy Act will not be declared void by the courts unless the creditor receiving the payment had actual knowledge of the insolvency at the time, or knowledge of such facts as would have put a reasonable man under the circumstances upon inquiry leading to such knowledge of insolvency, and the fact that the bankrupt sent out notices of his insolvency to other creditors generally will not affect the validity of the payment if the one receiving the payment was in ignorance thereof.

2. **Same—Offset by bank of deposit against note of bankrupt is not a preference within meaning of Bankrupt Act.**

The offset by a bank of the deposit of a bankrupt against his note is not a prohibited preference within the meaning of the Bankrupt Act.

CIVIL ACTION, before *Moore, J.*, at November Term, 1930, of BUNCOMBE.

M. Rubenstein was a merchant in the city of Asheville and filed a voluntary petition in bankruptcy on or about 10 January, 1930, and was duly adjudicated a bankrupt 13 January, 1930, and the plaintiff is the trustee in bankruptcy.

On or about 9 April, 1929, the bankrupt borrowed \$2,500 from the defendant Wachovia Bank and Trust Company and executed a note evidencing the loan. Said note was endorsed or guaranteed by the father and brother of the bankrupt, to wit, the defendants, S. Rubenstein and Lawrence Rubenstein. On 28 May, 1929, the bankrupt paid \$500 on said note before the maturity thereof. On 7 June the balance of \$2,000 was renewed to 6 August. On 10 June, 1929, the bankrupt borrowed an additional \$500 from the defendant bank, and the \$500 note and the \$2,000 note were combined on 7 August, and renewed to 6 October. When the \$2,500 note fell due it was renewed to 4 December. On 4 December, 1929, the bankrupt paid the sum of \$124 and renewed the balance of \$2,400 to 3 February, 1930. The bankrupt made the following payments on said note during December, 1929, to wit: 16th, \$500; 20th, \$700; 23d, \$500. On 27 December, 1929, the bankrupt gave the defendant bank a check for \$500, but at said time he did not have sufficient funds in the bank to pay said check. On 7 January, 1930, the defendant bank applied the deposit of the bankrupt then

BURNS v. TRUST CO.

to his credit in the bank to said \$500 check, and the guarantors of the bankrupt paid the balance of the indebtedness to said bank.

The bank required a financial statement from the bankrupt at the time the loan was made. This statement as of 1 January, 1929, showed assets aggregating \$48,986.13 and liabilities of \$5,000, thus disclosing an apparent net worth of \$43,986.13. The bankrupt made deposits in the bank from time to time in due course of business and drew checks from time to time against said deposit.

There was evidence tending to show that a firm of attorneys in Asheville had received for collection a few claims against the bankrupt during the month of September, 1929. There was also testimony that certain creditors brought suits against the bankrupt in a court of the justice of the peace. In one suit summons was issued 17 December, 1929, for the purpose of collecting \$50. The other summonses were issued on 27 December, but the evidence shows the cases were continued. On 24 December, the bankrupt sent out a letter to certain creditors disclosing his insolvent condition.

The plaintiff, as trustee in bankruptcy, brought this suit against the defendant bank to recover the payments which the bankrupt had made to the bank upon the note hereinbefore mentioned. The suit was instituted in the county court of Buncombe and the following issues were submitted to the jury:

1. "Did the payment of \$124 by check dated 4 December, 1929, on the note constitute a preference under the bankruptcy laws of the United States, as alleged in the complaint?"

2. "Did the payment of \$500 by check dated 16 December, 1929, on the note constitute a preference under the bankruptcy laws of the United States, as alleged in the complaint?"

3. "Did the payment of \$700 by check dated 20 December, 1929, on the note constitute a preference under the bankruptcy laws of the United States, as alleged in the complaint?"

4. "Did the payment of \$500 by check dated 23 December, 1929, on the note constitute a preference under the bankruptcy laws of the United States, as alleged in the complaint?"

5. "Did the payment of \$500 by check dated 27 December, 1929, on the note constitute a preference under the bankruptcy laws of the United States, as alleged in the complaint?"

The jury answered the first issue "No"; the second issue "No"; the third issue "Yes"; the fourth issue "Yes," and the fifth issue "Yes."

Thereupon judgment was entered in the county court upon the verdict, and the defendant Wachovia Bank and Trust Company appealed to the Superior Court upon exceptions and assignments of error based upon the trial in the county court.

BURNS v. TRUST CO.

The pertinent part of the judgment in the Superior Court is as follows: "After examining the record and hearing the argument of counsel the Court is of the opinion that the lower court erred in overruling defendant's motion for judgment of nonsuit, as aforesaid, for that there is no evidence in the record that the defendant, at the time the various payments were made, as set forth in the complaint, had any notice of the financial condition of Rubenstein at the time the payments were made, or any reasonable cause to believe that he was in failing financial circumstances.

It is, therefore, ordered by the court that this cause be and it is hereby remanded to the General County Court, and the judge of said court is directed to enter a judgment of nonsuit in said cause and dismiss said action at plaintiff's cost, and that plaintiff pay the costs of this appeal."

From the foregoing judgment the plaintiff appealed.

Joseph W. Little for plaintiff.

Ford, Coxe & Carter and J. A. Patla for defendant.

BROGDEN, J. Did the payments made by the bankrupt upon the note constitute a voidable preference as contemplated and defined by the National Bankruptcy Act?

The pertinent elements of a voidable preference are discussed in *Bridgers v. Trust Co.*, 198 N. C., 494, 152 S. E., 393. In the case at bar it is clear that the bankrupt was insolvent when the payments were made, and that all the payments were made within the four months period. Therefore, the determinative question is whether the defendant bank had reasonable cause to believe at the time the payments were made that such payments would effect a preference.

In the *Bridgers case*, *supra*, this Court said: "All the authorities concur in declaring that actual knowledge is not required, but reasonable cause to believe that a preference would result is sufficient to impose liability. Hence, a creditor receiving a payment or 'transfer' within the period of four months must exercise ordinary care to ascertain the facts, and, if the facts are sufficient to put him upon inquiry, he is chargeable with all the knowledge that such reasonable inquiry would have disclosed." The phrase "reasonable cause to believe" has been discussed and applied by many courts and textwriters. Manifestly, there is no hard and fast rule or inflexible standard known to the law by which the phrase may be applied with certainty and precision to a given state of facts. For this reason each case is viewed and interpreted in the light of the surrounding circumstances. *Mr. Justice Bradley*, in *Grant v. Bank*, 97 U. S., 80, 24 Law Ed., 971, wrote: "Hundreds of men constantly continue to make payments up to the very eve

DAVIS v. VENEER CORP.

of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided." *Boone v. Merchants and Farmers Bank*, 285 Fed., 183 (opinion delivered by District Judge Henry G. Connor); *Talty v. Rosenthal*, 14 Fed. (2d), 239; *Miller v. Martin*, 17 Fed. (2d), 291; *Everett v. Warfield Mining Co.*, 37 Fed. (2nd), 328.

The evidence does not disclose that the defendant bank received a copy of the letter which the bankrupt sent to certain creditors on 24 December, nor did it have any actual knowledge or information with reference to the suits instituted in a court of a justice of the peace, and all the evidence tends to show that the bankrupt and the bank were dealing in the ordinary and usual course of business. Therefore, we are of the opinion that the trial judge ruled correctly.

Perhaps the evidence would have been sufficient to put the bank upon notice at the time it applied the deposit of the bankrupt upon the indebtedness. However, it has been held that the right of setoff by a bank against an insolvent depositor is not a preference. *Bank v. Massey*, 192 U. S., 138, 48 Law Ed., 380; *U. S. v. Butterworth*, 267 U. S., 387, 69 Law Ed., 672; *Hodgin v. Bank*, 124 N. C., 540, 32 S. E., 887; *Coburn v. Carstarphen*, 194 N. C., 368, 139 S. E., 596.

Affirmed.

ADA DAVIS, DEPENDENT WIDOW OF TOM DAVIS, DECEASED EMPLOYEE, v. NORTH STATE VENEER CORPORATION AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

(Filed 27 January, 1931.)

1. Master and Servant F b—Definition of injury "arising out of and in the course of the employment."

The course of employment within the meaning of the Workmen's Compensation Act refers to the time, place and circumstance under which an accident causing the injury takes place, and an accident is received in

DAVIS v. VENEER CORP.

the course of employment if the employee is engaged in a duty he is employed and paid to perform, or which is reasonably incident thereto, and an accident arises "out of the employment" when there exists a causal connection between the two, or the accident could be reasonably contemplated as risk incident to or involved in the employment.

- 2. Same—In this case held: injury did not arise in the course of employment and was not compensable under the Workmen's Compensation Act.**

Where a mill owner permits an employee to sleep in the mill at night, and there is evidence that the employee voluntarily and without orders assumed to go for the superintendent at his home at night after his duties had ceased, and was struck and killed by an automobile: *Held*, the injury was not received through an accident in the course of the employment within the meaning of the Workmen's Compensation Act, and the fact that he punched the time clock before attempting his errand does not vary the result.

- 3. Same—Burden is on employee to prove that extraneous acts were within course of employment from custom or use.**

In order to bring extraneous acts of an employee within the course of his employment, as contemplated in the Workmen's Compensation Act, by habit or custom, the character of proof must be clear and convincing as to the antiquity of the custom or use, and also of its duration and universality in the location where it is claimed to exist.

CIVIL ACTION, before *MacRae, Special Judge*, at July Term, 1930, of DAVIDSON.

This was a proceeding before the North Carolina Industrial Commission for compensation for the death of plaintiff's intestate. The facts are clearly and accurately stated by Commissioner Dorsett, as follows:

"Tom Davis worked on the day shift for the North State Veneer Corporation. He lived in Lexington, North Carolina, and worked in Thomasville, North Carolina. He usually went home over each week end, when his wife would cook sufficient rations for his subsistence the following week. Tom Davis, the deceased, as above stated, worked in the day time and slept on the premises of his employer at night. The employer knew that Tom was sleeping on the premises and did not object to this. Tom was permitted to sleep there for his own convenience, the employer not expecting any service from Tom in exchange for allowing him to sleep there.

On the evening of the accident it seems that a piece of machinery in the plant of the employer broke down about nine o'clock, and as was customary on the night of the breakdown none of the bosses or superintendents were present at the plant. The custom was for the superintendent to give what orders he desired followed before going home for the day and the night employees were expected to carry out such orders. When the machinery broke down the deceased, knowing where the foreman lived, volunteered to go and get said foreman to repair the ma-

DAVIS v. VENEER CORP.

chinery since none of the employees on the job that night knew anything about repairing that certain piece of machinery which had broken down. Tom had no orders to go for the foreman, but went voluntarily. The evidence is that had certain machinery not been repaired at once certain veneering would have been ruined. It is also in evidence that on two or three occasions prior to this occasion Tom Davis had gone to the home of the foreman to report certain breakdowns and to show other employees who had to see the foreman on business where the said foreman lived. It is also in evidence that for such trips Tom never received any remuneration. He never asked for any. On the evening of the fatal accident, however, it seems that Tom, before leaving the plant for the home of the foreman, punched the time clock and then set out on his journey, and while going to the home of the foreman he suffered an accident when an automobile driven by a hit-and-run driver struck him. Tom was found around midnight by the foreman to whose home he was going, and another gentleman. He was carried to High Point to a hospital where he died some two or three days later."

Upon the foregoing facts the Commission found that the employee was injured "in the course of his employment" and made an award. The defendant appealed to the Superior Court, and the trial judge approved the award, from which judgment the defendant appealed.

W. O. Burgin and Walser & Walser for plaintiff.
Manly, Hendren & Womble for defendant.

BROGDEN, J. Was the death of plaintiff occasioned "by accident arising out of and in the course of the employment?"

"In order that compensation may be due the injury must arise out of and also be received in the course of the employment—neither alone is enough. It is not easy . . . to give comprehensive definition of these words . . . an injury is received, in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of the employment' when there is . . . a causal connection between the conditions under which the work is required to be done and the resulting injury. . . . If the injury can be seen . . . to have been contemplated by a reasonable person familiar with the whole situation . . . then it 'arises out of the employment.' The causative danger must be peculiar to the work and not common to the neighborhood." *Chief Justice Rigg in McNicol's case*, 102 N. E., 697, N. C. Industrial Commission Report, 131. Similar definition occurs in the case of *Wirta v. North Butte Mining Co.*, 210 Pac., 332, 30 A. L. R., 964, in these words: "The words 'in the course of an employment' refer to the time, place, and circumstances under

DAVIS v. VENEER CORP.

which the accident took place, and an accident arises 'in the course of the employment' if it occurs while the employee is doing the duty which he is employed to perform." This Court in *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266, adopted the following definition: "An accident arising 'in the course of' the employment is one which occurs while 'the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing' or one which 'occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed.'" See, also, *Harden v. Furniture Co.*, 199 N. C., 733; *Phifer v. Foremost Dairy*, ante, 65. See, also, Annotation 6 A. L. R., 1247; 30 A. L. R., 972.

The deceased employee was a laborer at the veneer plant of defendant. The record does not disclose the specific nature of his duties, but he worked on the day-shift and his day's work came to an end at 5:34. The record does not disclose that he was working at the drykiln or during working hours charged with any duty with respect to the engine or the machinery in the plant. His time card showed a punch at 9:32 at night, indicating that the deceased employee was expecting to receive pay for his services in making the trip to the home of the foreman in order to notify him that the engine had broken down and would not run. There was no request made by any person in authority, or even by a fellow employee that the deceased should make the journey to the home of the foreman. At the time of his injury he was some distance beyond the home of the foreman. Under the facts set out in the record it is manifest that the injury did not occur during working time or at the place where the employee was assigned to work, nor did the injury occur in the performance of any duty incidental to the work assigned by the employer. Upon these facts and circumstances, we are of the opinion that the plaintiff is not entitled to recover.

It is suggested in many cases that an employee should be allowed to recover where he was performing some act in an emergency involving the safety of life or limb of a fellow employee or other person about the premises, and even when endeavoring to protect and safeguard the property of the employer. Many of the emergency cases are annotated in 30 A. L. R., *supra*. An examination of these cases will disclose that emergencies have been interpreted as unforeseen events happening in and about the premises which threaten or menace life, limb, or destruction of property. These cases cover the field of injuries resulting from fires, riots, explosions, drowning, shooting and other events portending immediate peril and foreboding serious injury or destruction. The breakdown of a piece of machinery or its failure to function could

STATE v. BURNO.

not be reasonably classified as an emergency. Certainly any sort of machinery trouble would entail some degree of loss upon the employer.

The claimant relies upon *Grieb v. Hammerle*, 118 N. E., 805, 7 A. L. R., 1075. The Court said: "The argument is made that the injury did not arise out of or in the course of the servant's employment. I think that is too narrow a view. If Grieb had been injured during working hours, it would make no difference that his service was gratuitous. If the service was incidental to the employer's business and was rendered at the employer's request, it would be part of the employment within the meaning of this statute. Any other ruling would discourage helpful loyalty. . . . *Pro hac vice*, by force of custom or request, the employment is enlarged." In the *Grieb case* the injured employee was requested by the employer to deliver certain boxes of cigars to a customer, and in attempting to make the delivery he fell down stairs and was killed. An analysis of the case will disclose that the recovery was based upon the request of the employer to deliver the cigars.

In the case at bar there was no request and no evidence of custom. It is true that there was evidence that the deceased employee had notified the foreman of the breakdown on one or two previous occasions. A witness testified: "All I remember is him going once before, something like that, may be twice." In order to impose liability by virtue of custom the character of proof must be clear and convincing as to the antiquity, duration, and universality of the usage in the locality where it is claimed to exist. *Penland v. Ingle*, 138 N. C., 457, 50 S. E., 850; *Crown Co. v. Jones*, 196 N. C., 208, 145 S. E., 5.

Reversed.

STATE v. SAM BURNO, SIMON PORTEE AND LAWYER TUCKER.

(Filed 27 January, 1931.)

1. Criminal Law G i—Physician qualifying as expert held competent to testify as to mental condition of prosecuting witness.

It is competent for a physician who has qualified as an expert, and who has attended the prosecuting witness in a prosecution for assault and battery, to testify from his own observation as to the mental incapacity of the prosecuting witness to have his evidence taken by deposition at one time and later when the depositions were taken that the witness' mind was sufficiently clear.

2. Criminal Law G m—Evidence of defendant's guilt held sufficient to be submitted to the jury.

Testimony of the prosecuting witness that the defendant was one of several who had beat him, with testimony of an expert witness that the

STATE v. BURNO.

prosecuting witness had sufficient mental capacity, after he had been beaten, to identify his assailants, is held sufficient to be submitted to the jury in a prosecution for assault and battery.

3. Same—It is not necessary to prove motive in order to convict a defendant of crime.

Where there is positive evidence that the defendant under indictment for an assault actually committed the offense it is not indispensable to a conviction that motive be shown.

APPEAL by defendant Sam Burno from *Oglesby, J.*, and a jury, at April Term, 1930, of RICHMOND. No error.

The above named defendants were tried on a bill of indictment charging an assault with intent to kill one Bostick Williams. All three of defendants were convicted of assault with a deadly weapon and the defendant, Sam Burno, appealed from such conviction and the judgment of the court in which each of the defendants were sentenced to serve eighteen months on the county roads of Richmond County. The alleged assault was committed on 21 July, 1929.

Bostick Williams testified, in part: "I know the defendants, having known Burno about eight years, Simon Portee eight or ten years, and Lawyer Tucker four or five years. Burno was living in Hamlet, but was running a drug store in Southern Pines. Portee and Tucker lived near me in the North Yard; no one lived nearer than 400 or 500 yards to me. . . . On Friday while I was at home about midnight the defendants came to my house; they broke the door open and rushed right in on me. They all had sticks and they began to beat me, and I said, 'What is the matter; what have I done?' and they did not answer, but each one hit me a lick apiece. I was so unconscious I could hear them say something but could not understand it. They hit me as many as three times, and I do not know how many more. These are the scars on my head from the licks. I did not come to myself until some time Monday, and when I did I was lying across my bed with my clothes on. . . . I was laid up between seven and eight weeks as near as I can remember."

Cross-examination, in part: "The defendant, Sam Burno, runs a drug store in Southern Pines, but he also has a store in the North Yards, which his wife looks after for him; Sam spends most of his time at Southern Pines, but comes home Saturday nights; his wife told me that he usually comes home on Saturday nights. There was nothing between me and Sam's wife. We are good friends and that is all. There is nothing between me and Sam Burno. I have never given him any cause to dislike me. Burno hit me first. I did not hit them; I had nothing to hit with."

STATE v. BURNO.

It was admitted by defendant that Dr. M. A. Hatcher is an expert physician and surgeon. He testified: "I went to see Bostick Williams on the 21st or 22d of July. He was in a house on the North Yard section of Hamlet. Other people came to the house, but he had been living alone, I understood. He had many wounds on his head and was very bloody; several bruises on his body, but the worst ones were on his head. It is hard to tell what kind of instrument the wounds appeared to have been made with, but I think it was a blunt instrument. His eyes were bloodshot and somewhat swollen. He could not give a coherent statement of how he came by those injuries. Q. When do you think he could give a coherent statement? (Objection by defendant; overruled; exception.) It was two days later that we thought he could tell a straight story about it. . . . I saw him three times between Monday and the 24th, when he made the deposition. On the 24th, I had been there and dressed his wounds before he made the deposition. The other visits were once a day. His wounds seemed to be of a serious nature. Q. What was your opinion at the time you visited him the first day or two as to whether or not he would live? (Objection by defendant; overruled; exception.) We feared for his life. I feared for his life, because I did not know what internal injuries he had and what cranial injuries. I treated him from 22 July until 9 September. Q. From your examination of Williams, state whether or not you have an opinion, satisfactory to yourself, as to whether or not he was responsible for what he said or did not say on Monday. (Objection.) By the court: Tell the state of his mind. I will not let him give his opinion as to his physical state. A. I believe he was responsible mentally part of the time, and part of the time he was not. (To the foregoing question and answer objection by defendant; overruled; exception.) He would talk at times, and other times you could get no response to questions; he would appear to be hazy and *non compos mentis*, I believe they call it."

B. L. Finch testified, in part: "He made a statement to us. He said it was about one, Sunday morning, that these three defendants broke his door open and came in there and hit him with a stick and that was all he remembered until next day or Monday. He said this was Saturday night about twelve or one. I have known Bostick six or seven years and his general reputation is good, so far as I know. . . . It was Sam Burno's car the chief examined and found blood on. It was two or three days after this alleged assault. The spot was about as big as the palm of your hand. It was dried. . . . It was a Chrysler car in front of Sam's house in Hamlet. . . . The blood looked like it had not been there very long. It was not right red, but you could tell it was blood. You could not tell whether it was human or animal blood."

There was other corroborative evidence offered by the State.

STATE v. BURNO.

The defendant denied his guilt and testified that at the time of the alleged assault he was at Southern Pines, and in this he was corroborated by several witnesses.

At the conclusion of the evidence defendant asked the court in writing to instruct the jury that if they found the facts to be as testified to by the witnesses, it would be their duty to return a verdict of not guilty as to Sam Burno. The court declined to do this, and the defendant excepted. The defendant renewed his motion to dismiss as of nonsuit after all of the evidence was in. The court declined to do so, and the defendant excepted. The defendant excepted to the following part of the charge of the court below: "The court further instructs you that motive is not a necessary element of the offense or either of the offenses charged in the bill under which the defendants are being tried. Intention is a necessary element of the offense of assault with intent to kill and must be established beyond a reasonable doubt; that is the intent to kill. It may be established by acts or may be established by the circumstances in the case."

The defendant duly assigned errors to the exceptions above set forth, and appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Fred W. Bynum for defendant, Sam Burno.

CLARKSON, J. At the close of the State's evidence and at the close of all the evidence, the defendant, Sam Burno, made motions to dismiss or for judgment of nonsuit. C. S., 4643. The defendant at the conclusion of the evidence also requested the court in writing to instruct the jury that if they found the facts to be as testified to by the witnesses, that it would be their duty to return a verdict of not guilty as to Sam Burno. The court below refused these motions, and in this we can see no error.

The prosecuting witness testified that he had known defendant Burno about eight years. "Each one hit me a lick apiece . . . Sam Burno hit me first. I did not hit them; I had nothing to hit with." There is no conjecture or guess about this evidence. It is positive and unequivocal that defendant Burno hit him and was the first to do so. This was sufficient evidence to be submitted to the jury, and the probative force was for the jury to determine and not this Court.

Const. of N. C., Art. IV, sec. 8, in part, is as follows: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference."

In *S. v. Lawrence*, 196 N. C., at p. 564, is the following: "The competency, admissibility and sufficiency of evidence is for the court to de-

STATE v. BURNO.

termine, the weight, effect and credibility is for the jury. *S. v. Utley, supra*, (126 N. C., 997); *S. v. Blackwelder*, 182 N. C., 899." *S. v. McLeod*, 198 N. C., 649.

The assignments of error in regard to the testimony of Dr. M. A. Hatcher cannot be sustained. Doctor Hatcher, an expert, was being examined as to Williams' wound and the extent of his injuries. There appeared elsewhere in the defendant's evidence, some evidence of contradictory statements made by the prosecuting witness about the time that the doctor examined him and of which he was testifying. He testified that Williams could not give a coherent statement of how he came by his injuries. Thereupon, the solicitor asked the doctor, "When do you think he could give a coherent statement?" This was objected to, but the answer was admitted and exception taken. The doctor's reply was, "It was two days later that he thought he could tell a straight story about it." The doctor further testified that at this period Williams was responsible, mentally, part of the time, and part of the time he was not. He would talk at times and other times you could get no response to questions. He would appear to be hazy and *non compos mentis*. This, of course, was material, and it was the kind of evidence that the doctor, as an expert, could give from his own investigation of the patient, at that time. *S. v. Fox*, 197 N. C., 478, and the cases there cited at p. 486.

In 11 R. C. L., part sec. 35, "Expert opinion evidence," pp. 609-10, speaking to the subject: "A practicing physician, however, who has attended a patient, or examined him for the purpose of testifying, may state his opinion as to the nature of the disease or disability from which he was suffering, the facts which probably produced or might have produced his condition, the physical or mental effects to be expected from a certain injury or disease, the probable continuance and future course of an existing disease or disability, and the probable or possible cause of death."

The charge as to motive is not subject to criticism in this jurisdiction. "It is never indispensable to a conviction that a motive for the commission of the crime should appear. . . . *S. v. Green*, 92 N. C., at p. 782; *S. v. Stratford*, 149 N. C., 483; *S. v. Wilkins*, 158 N. C., 603." *S. v. Lawrence*, 196 N. C., at p. 565.

In the judgment below we find in law

No error.

IN RE ESTATE OF SMITH.

IN RE ESTATE OF FANNIE A. SMITH, DECEASED.

(Filed 27 January, 1931.)

1. Courts A a—Superior courts are given jurisdiction of suits formerly within jurisdiction of courts of equity.

Our Constitution provided one form of action for the enforcement or protection of private rights or the redress of private wrongs (Art. IV, sec. 1), and such suits theretofore pending were transferred to the courts acquiring jurisdiction without prejudice (Art. IV, sec. 20), and hence the Superior Courts have equitable jurisdiction of all equitable powers when not restrained by statute.

2. Clerks of Court B a—Clerks of court have no equitable jurisdiction except that plainly conferred by statute.

The equitable jurisdiction of the Superior Courts does not extend to the clerks of court unless expressly given by statute, and C. S., 4023 *et seq.* giving clerks of court a limited power to appoint trustees in certain instances will not be extended to give them jurisdiction of any proceeding unless clearly within the provisions of the statutes.

3. Trusts F a—Where one of two trustees appointed by will fails to qualify the other appointed trustee should execute the trust.

Where only one of two trustees appointed by will has qualified and acts as such, courts of equity will not appoint another, the presumption being that the testator desires the trust to be administered by the trustee he appointed alone rather than have another appointed by the courts to act with him.

APPEAL by G. Francis Smith, petitioner, from *Sink, Special Judge*, at September Term, 1930, of GUILFORD.

This is a proceeding before the clerk of the Superior Court for the appointment of a trustee and for other relief.

Fannie A. Smith died in 1928, leaving the following will:

"First. I nominate and appoint my son-in-law, Leonard DeMerritt, of Norfolk, Virginia, and my son-in-law, Ernest A. Arend, of Red Bank, New Jersey, executors and trustees of this my last will and testament, to serve without compensation and without being required to give any bond for the faithful performance of their duties in North Carolina or elsewhere; and I give my said executors and trustees full power to sell any or all of my real estate and personal property, at such times and upon such terms as they shall deem advisable.

Second. I direct my said executors to erect a suitable monument at my grave and to expend the necessary sum for the perpetual care of my grave and my cemetery plot.

Third. I give and bequeath to my daughter, Eugenia Smith DeMerritt, now living in Norfolk, Virginia, all of my household goods, furniture, clothing and jewelry.

IN RE ESTATE OF SMITH.

Fourth. If my son, G. Francis Smith, is living at the time of my decease, I direct that all of my estate, except as above provided, be held in trust by my executors and trustees above named, and I direct that from the annual income of my said estate, they expend such sums as in their discretion they deem advisable for the support and maintenance of my said son, G. Francis Smith, and that the balance of the said income be paid annually to my other children, Eugenia Smith DeMerritt, and Dr. Owen Smith, of High Point, North Carolina, or to the survivor of them.

Fifth. At the death of my said son, G. Francis Smith, or at my death, if my said son shall not survive me, I direct that my said estate shall go to my said children, Eugenia Smith DeMerritt and Dr. Owen Smith, or to the survivor of them."

In May, 1930, G. Francis Smith filed a petition before the clerk setting out the will, and alleging that Dr. Owen Smith had recently died, leaving the petitioner and Eugenia Smith DeMerritt as the sole beneficiaries; that the petitioner was entitled to more than his present allowance of \$75 a month from the income of the estate; that Ernest A. Arend had not qualified as executor or trustee; that Leonard DeMerritt, who had qualified as executor and trustee, was abusing the discretion vested in him by the testatrix and wrongfully withholding from the petitioner a part of the income to which he was entitled. The relief sought was the appointment of a trustee in place of Arend, to serve jointly with DeMerritt, and an increased allowance. Notice was served on Leonard DeMerritt and he filed an answer to the petition. The clerk appointed the Greensboro Bank and Trust Company as cotrustee with DeMerritt, and upon appeal by DeMerritt Judge Sink reversed the judgment, holding that the clerk was without authority to render judgment, and that the Superior Court had no jurisdiction in the cause. Judgment was given for the respondent and the petitioner excepted and appealed.

Herbert S. Falk for appellant.

H. L. Koontz and Edwin Martenet for respondent, appellee.

ADAMS, J. In her will Mrs. Smith appointed Leonard DeMerritt and Ernest A. Arend, her sons-in-law, executors and trustees of her estate, and charged them with the execution of the trust created for the benefit of G. Francis Smith, the petitioner. DeMerritt qualified and is acting in both capacities; Arend has neither qualified as executor nor accepted the trust. The petitioner, claiming that the amount allowed him by DeMerritt is insufficient for his maintenance, instituted an *ex parte* proceeding before the clerk for an increased allowance and for the appointment of a cotrustee.

IN RE ESTATE OF SMITH.

The jurisdiction of equity to grant relief originates in the occasional inadequacy of the remedy at law; and among cases of inadequacy are those in which the courts of ordinary jurisdiction cannot enforce a right. The equities under this head include those for the performance of trusts. The creation of trusts and the rules by which the conduct of trustees is governed fall properly within the jurisdiction of courts of equity. "It is but reasonable that these courts, after having called the equitable title into existence, should continue to exercise over it a constant care and supervision. Equity affords this protection by appointing and removing trustees, by superintending their discharge of the duties of the trust, by regulating their liability, by filling a vacancy or vacancies in the office of trustee, and finally, by affording the trustees, upon a proper application and upon proper cause shown, the advice and assistance of the court." Bispham's Principles of Equity, sec. 135.

The Constitution of 1868 abolished the distinctions between actions at law and suits in equity and provided one form of action for the enforcement or protection of private rights or the redress of private wrongs. Art. IV, sec. 1. Actions at law and suits in equity pending when the Constitution went into effect were transferred to the courts having jurisdiction, without prejudice by reason of the change. Art. IV, sec. 20. Under this provision the Superior Courts became the successors of the Courts of Equity, having their jurisdiction and exercising their equitable powers unless restrained by statute. *McLarty v. Urquhart*, 153 N. C., 339; *Settle v. Settle*, 141 N. C., 553; *White v. Butcher*, 97 N. C., 7; *Moye v. Cogdell*, 66 N. C., 403; *Turner v. Lowe*, *ibid.*, 413.

The clerk of the Superior Court is not given the jurisdiction of a court of equity. He is not vested with power affirmatively to administer an equity except where it is specially conferred by statute. *Bank v. Leverette*, 187 N. C., 743; *McCauley v. McCauley*, 122 N. C., 289; *Vance v. Vance*, 118 N. C., 865; *Bragg v. Lyon*, 93 N. C., 151. He may accept the resignation of executors, administrators, guardians, and trustees, and may appoint their successors when a special proceeding is brought, a final accounting had, and the clerk's order is approved by the judge. C. S., 4023, *et seq.* When the sole or last surviving trustee named in a will or deed of trust dies, and in other specified instances, the clerk by proceedings in which all interested persons are parties may appoint a trustee to execute the trust. C. S., 2583. But these statutes are not applicable here. Neither of the appointees has resigned, and the estate is not without a trustee. If, regardless of any statutory provision, the clerk had inherent power in the exercise of equitable jurisdiction generally to appoint trustees when necessary or expedient, a very different question would be presented.

IN RE ESTATE OF SMITH.

It may be suggested that the judge could have retained the cause and determined the controversy after the appeal had been perfected. C. S., 637, provides: "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

Conceding that by virtue of this statute the Superior Court may retain a cause on appeal from the clerk, we are confronted with the question whether the record discloses facts which would warrant a decree in equity for the relief demanded in the petition.

If Arend had accepted the appointment and had qualified as the testatrix contemplated, he and DeMerritt would have held the estate as joint tenants; but, as he did not qualify, DeMerritt was clothed with authority to perform the trust. Where joint trustees are appointed any one of them may execute the trust in the event of the death of his cotrustee or cotrustees or of the refusal or inability of the cotrustee or cotrustees to act. It is so provided by C. S., 1736. The principle is this: When the testatrix appointed DeMerritt and Arend to manage her estate she indicated her choice of their joint services and most probably the services of the survivor in preference to those of some other person in whose selection she could have no part. 26 R. C. L., 1276; Annotation, 130 A. S. R., 508; *Cameron v. Hicks*, 141 N. C., 21; *Webb v. Borden*, 145 N. C., 188.

The result is that the appointment of a cotrustee with DeMerritt is not a condition necessarily precedent to a faithful execution of the trust created in behalf of the petitioner. For just cause a court of equity might remove DeMerritt; but the petitioner does not ask his removal. If just cause is shown a cotrustee may be appointed, as the petitioner prays; but the necessity or expediency of such appointment should be inquired into and determined by a suit in equity in which all persons having a beneficial interest are made parties and given an opportunity to be heard and in which the complaint or bill should fully set forth facts which, if established, would justify a decree for the relief sought by the petitioner. In both these respects the present proceeding is insufficient. Judgment

Affirmed.

SWINSON *v.* REALTY CO.

MRS. B. J. SWINSON *v.* CUTTER REALTY COMPANY.

(Filed 27 January, 1931.)

- 1. Actions B d—Action to recover damage caused by permanent obstruction to sidewalk is for nuisance and not for negligence.**

Where an action for damages is founded upon the erection of defendant's building over his property line upon the sidewalk of a city street rendering the use of the sidewalk dangerous to pedestrians taken in connection with a projecting water pipe partly over the sidewalk, the gravamen of the action is to recover damages arising from a nuisance created by the defendant and not exclusively involving the negligence of the defendant.

- 2. Nuisance A a—Nuisance is primarily condition and not an act, and may involve elements of negligence.**

A nuisance may or may not involve elements of negligence and may exist not only by reason of a positive act, but by negligent failure to perform a positive duty, and primarily a nuisance is a condition and not an act, and a thing or act which may be lawful may be a nuisance because of its negligent use or operation.

- 3. Municipal Corporations E c—City building inspector has not authority to permit individual to obstruct sidewalk with permanent projection.**

A municipal corporation holds its streets for the safe use of the public, and its building inspector may not permit an owner of property thereon to so erect a building on his own lands as to be a menace of injury to pedestrians or others, and by permission to the owner permit him to escape from the damages caused to a user of the street.

- 4. Nuisance A b—Question of whether projection of building over sidewalk is nuisance is ordinarily for jury.**

Where the owner has erected a building having a water hydrant projecting from the wall above a sidewalk, the question as to whether this constitutes an actual nuisance as being a menace to pedestrians using the sidewalk is dependent upon surroundings or conditions under which it is maintained or whether against the public rights or general welfare, and is ordinarily a question for the determination of the jury in an action for damages for an injury caused thereby.

- 5. Same—Testimony of whether place where projection extended over sidewalk was sufficiently lighted held competent.**

In an action to recover damages against the owner of a building having a hydrant projecting above the sidewalk nine inches, causing injury to a pedestrian at night, testimony as to whether the place was sufficiently lighted by the city is competent although the city is not a party to the action.

APPEAL by defendant from *Harwood, Special Judge*, at September Special Term, 1930, of MECKLENBURG. New trial.

The plaintiff is a resident of Mecklenburg County; the defendant is a corporation and the owner of a building on the southeast corner of

SWINSON v. REALTY CO.

North Tryon and East Fifth streets in the city of Charlotte. In constructing the building on its lot the defendant located one of the walls on the line dividing the lot from the street. About fifty feet from the corner of North Tryon Street a hydrant projects from this wall on East Fifth Street a distance of nine inches. It has two openings available in case of fire to throw water by an engine to an inside sprinkler system, and is about forty-one inches above the surface of the sidewalk. The sidewalk at this place is five and one-half feet in width.

The plaintiff testified that at 8:30 p.m. on 19 December, 1929, she, Clara Wentz, and Evelyn Wentz were walking on East Fifth Street in front of the defendant's building; that the night was cold and dark; that cars were parked along the street and there was no light; that she came in contact with the projecting hydrant which, she said, "hit me just above the waist line on the right side." She said she was thereby seriously injured, and contended that for the injury and consequent loss she was entitled to damages. The defendant offered no evidence.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by her own negligence, contribute to her injury, as alleged in the answer? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: \$1,250.

Judgment was rendered for the plaintiff and the defendant appealed upon reserved exceptions.

Stancill & Davis for plaintiff.

John M. Robinson and Hunter M. Jones for defendant.

ADAMS, J. The issues and the charge of the court show that the case was tried upon the theory of negligence. In our opinion this exclusive view of the evidence does not satisfactorily present the merits of the controversy. The question of the defendant's liability grows out of a situation alleged to import menace and substantial injury to pedestrians on the sidewalk by their coming in contact with the hydrant projecting from a wall of the defendant's building. This projecting pipe, it is said, is an obstruction in the street.

McQuillin observes that an illegal obstruction which interferes with the free use of a street as such is within the legal notion of a nuisance, but to constitute a nuisance there must be such an annoyance to the public as to render the use of the street hazardous or to prevent its free and unobstructed use as a public thoroughfare. 3 Municipal Corporations (2 ed.), sec. 982. A nuisance may or may not involve elements of

SWINSON *v.* REALTY CO.

negligence; it may exist, not only by reason of a positive act, but by the negligent failure to perform a duty. *White v. New Bern*, 146 N. C., 447; *Alexander v. Statesville*, 165 N. C., 527. Primarily a nuisance is a condition, not an act, although a thing or an act which is lawful may be a nuisance by reason of its negligent use or operation.

Projecting the hydrant from the wall of the building over a part of the sidewalk created a permanent condition. This condition and not the negligent operation of the hydrant is the basis of the asserted liability, and on this point the crucial and decisive question is whether it is such annoyance to the public as to make the use of the sidewalk at that place hazardous or to prevent its free and unobstructed use. In *Godfrey v. Power Co.*, 190 N. C., 24, it is said: "The foundation of legal liability for the creation or maintenance of a nuisance is ordinarily not so much the degree of care that is used as the degree of danger that exists even with the best of care, while the ground of civil liability for negligence is injury to person or property when such injury is not the result of premeditation and formed intention."

It is alleged in the complaint that the defendant constructed the building and put the hydrant in the wall. This, we understand, is not denied; but on the cross-examination of the building inspector, who was a witness for the plaintiff, the defendant elicited evidence that it was the inspector's duty to pass upon the construction of the building and that he did so and approved the entire structure. It is thence argued that the city approved the construction of the building and that no liability attaches to the defendant by reason of the hydrant.

Municipal corporations hold their streets in trust for the public, and as a rule the right of the public to use the streets in a proper way is absolute and paramount. 4 McQuillin, *supra*, sec. 1437. "The law is well settled that the title either of the fee in the soil or an easement is vested in the municipality in trust for the use of the people as and for a public highway, and that it cannot without legislative authority, divert them from this use." *Elizabeth City v. Banks*, 150 N. C., 407. This accords with the general rule that in the absence of legislative authority a municipal corporation has no power to authorize a private individual to make a permanent use of any portion of a street for any private purpose that will interfere with the legitimate use of the street for travel, although some space is left for the public passage. 19 R. C. L., 782, sec. 87. The record does not disclose any legislative enactment authorizing the alleged obstruction, and without such authority the consent of the city, if established, would be no defense. 4 McQuillin, *supra*, sec. 1437, p. 107; *S. v. R. R.*, 141 N. C., 736; *White v. New Bern*, *supra*; 25 L. R. A. (N. S.), 405; Annotation; *New York v. Rice*, 28 L. R. A. (N. S.), 375.

SWINSON v. REALTY CO.

Again, it is said by McQuillin that an unauthorized permanent obstruction of a street is necessarily a public nuisance, while a temporary encroachment may or may not be. Sec. 982, p. 206. A nuisance may be both public and private. *McManus v. R. R.*, 150 N. C., 655. An act or thing may be a nuisance *per se*; or in its nature it may not be a nuisance, but may become so by reason of its locality and surroundings. The projection of the hydrant from the walls of the defendant's building a distance of nine inches over the sidewalk is not necessarily a nuisance. Whether it is a nuisance is dependent upon the surroundings and conditions under which it is maintained; and the determination of this question is a matter for the jury under appropriate instructions as to the law. *S. v. Malpass*, 189 N. C., 349; *Brooks v. Mills Co.*, 182 N. C., 719; *Guano Co. v. Lumber Co.*, 168 N. C., 337; *S. v. Edens*, 85 N. C., 522, 527; *Graves v. Shattuck*, 69 A. D., 536. McQuillin says the final question is whether an obstruction or encroachment upon the street is unreasonable and against public rights and the general welfare. Sec. 1438. It is proper to consider as relevant to the question evidence tending to show the width of the sidewalk, the place of the hydrant with respect to its height from the surface, its length, whether it was reasonably observable, and whether under the circumstances it was hazardous to the public. In the absence of statutory requirement a city is under no obligation to light its streets, and when the streets are otherwise reasonably safe neither the absence of lights nor the existence of defective lights is in itself negligence. *White v. New Bern*, *supra*. Here the city is not a defendant, but the condition of the lights at the time and place of the plaintiff's injury may be considered as evidence on the question whether the defendant created hazardous conditions by encroaching upon the sidewalk and failing to give sufficient warning of the danger. See *Ruocco v. United Advertising Corporation*, 119 At., 48. On the other hand there is evidence that the hydrant was constructed in a way that was usual and customary in Charlotte and other cities. There are circumstances in which neither custom nor necessity will justify the creation of a nuisance; but when a plaintiff shows that the act upon which negligence is predicated was performed in the customary way, the absence of negligence may frequently be inferred. The principle is thus stated in *Weireter v. R. R.*, 178 N. W., 887: "It is true that proving that something was done in the customary way does not necessarily prove that it was not done negligently. The usual way may be a negligent way. But, when the plaintiff shows that the act upon which negligence is predicated was performed in the customary way, the inference nearest at hand is that no negligence has been proven, and the action must fall unless he adduces some evidence by way of experts or otherwise that will justify the jury in concluding that,

ANDREWS v. CLAY COUNTY.

even though the act was done according to the usual custom, it was nevertheless negligently done, or unless it may be said that the common experience of the ordinary juror makes him competent to determine, without aid of evidence, whether or not the act was negligently performed."

The evidence in this case involves elements of nuisance and negligence and in the instructions excepted to the merits of the whole controversy are not sufficiently determined by the charge or the verdict.

New trial.

TOWN OF ANDREWS ET AL. v. CLAY COUNTY ET AL.

(Filed 27 January, 1931.)

Taxation B d—Property lawfully owned by city is exempt from taxation regardless of county in which property is situate.

When property is lawfully acquired by an incorporated town it is free from the burden of taxation by State or county by the express provisions of our State Constitution, Article V, section 5, regardless of the purpose for which it is used, and *held*: where a town acquires lands in another county of the State for the purpose of generating electricity thereon for the use of its inhabitants and others, the property is exempt from taxation by the county in which the land is situate, and statutes that provide that the property must be wholly for public or school purposes in order to exempt it from taxation are void if in conflict with the constitutional provision to the extent of such conflict, the constitutional provision being self-executing.

APPEAL by defendants from *MacRae, Special Judge*, at September-October Term, 1930, of CLAY. Affirmed.

This is an action to restrain and enjoin the defendants, Clay County and the sheriff and tax collector of said county, from collecting or attempting to collect taxes levied by Clay County, for the years 1925, 1926, 1927, 1928, and 1929, on property located in said county and owned during said years by the plaintiff, town of Andrews, on the ground that said property was exempt during said years from taxation, under the provisions of section 5 of Article V of the Constitution of North Carolina.

The town of Andrews is a municipal corporation, organized and existing under the laws of this State, and located in Cherokee County.

The property on which taxes were levied by the defendant, Clay County, for the years 1925, 1926, 1927, 1928, and 1929, consists of 205 acres of land. The said land was owned and used by the plaintiff during said years as the site of a power plant for the generation of electricity,

ANDREWS v. CLAY COUNTY.

which was transmitted over wires from said power plant in Clay County to the town of Andrews in Cherokee County and there used by said town of Andrews for lighting its streets and municipal buildings, and for distribution among the citizens of said town, for domestic and commercial purposes. The revenue derived from the distribution and sale of electricity to citizens of said town was used to pay the expense of maintaining and operating its electric light and power plant. The town of Andrews purchased the land in Clay County and constructed its power plant thereon under the authority of an act of the General Assembly of this State. It paid for said land and for the construction of said power plant out of funds raised by the issuance and sale of its municipal bonds.

The action was heard on motion of plaintiffs for judgment on the facts admitted in the pleadings as above stated. This motion was allowed.

From judgment declaring that the levy of taxes by the defendant, Clay County, for the years 1925, 1926, 1927, 1928 and 1929, on the property described in the complaint, was illegal and void, and restraining and enjoining the defendants, permanently, from collecting or attempting to collect said taxes, or any part thereof, defendants appealed to the Supreme Court.

Dillard & Hill for plaintiffs.

R. L. Phillips, J. B. Gray and W. C. Wakefield for defendants.

CONNOR, J. Section 5 of Article V of the Constitution of North Carolina, adopted by the people of this State in 1868, is as follows:

"Property Exempt from Taxation. Property belonging to the State or to municipal corporations, shall be exempt from taxation.

"The General Assembly may exempt cemeteries, and property held for educational, scientific, literary, charitable or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers; libraries, and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars."

The Machinery Acts enacted by the General Assembly of this State, under which property, both real and personal, was assessed for taxation for the years 1925, 1926, 1927, 1928, and 1929, each, contain a section in words as follows:

"The following real property and no other shall be exempted from taxation:

"(1) Real property, directly or indirectly owned by the United States or this State, however held, and real property lawfully owned and held

ANDREWS *v.* CLAY COUNTY.

by counties, cities, townships or school districts, used wholly and exclusively for public or school purposes."

The defendants contend that under the provisions of the machinery acts in force during the years 1925, 1926, 1927, 1928, and 1929, the real property described in the complaint, although lawfully owned by the plaintiff, a municipal corporation, during said years, was not exempt from taxation by Clay County, for the reason that the said property was not owned and used by said municipal corporation wholly and exclusively for public purposes. The plaintiffs contend that notwithstanding the language used in the statutes with respect to the exemption of property owned by municipal corporations from taxation, the said property was exempt from all taxation by the State, or by any of its political subdivisions, during the years 1925, 1926, 1927, 1928, and 1929, by the express language of section 5 of Article V of the Constitution of North Carolina.

The provision in the first clause of section 5 of Article V of the Constitution of North Carolina, by which property belonging to or owned by a municipal corporation, is exempt from taxation, is self-executing, and by its own force, without the aid of legislation, exempts such property from taxation by the State or by the political subdivision of the State in which it is located, because of its ownership, and without regard to the purpose for which such property was acquired and held by the corporation. With respect to such property, when lawfully acquired and held by statutory authority, new or additional conditions cannot be imposed by the General Assembly as prerequisites for its exemption from taxation. 37 Cyc., p. 886. The language of the constitutional provision is so clear and unambiguous that there is no room for judicial construction. The fact that social, economic and political conditions in this State have undergone great changes since the adoption of our present Constitution, resulting in an enlargement of the functions of municipal corporations to meet the requirements of changed conditions, would not justify a construction of this provision which would in effect result in its amendment by the courts and not by the people.

If required to adopt the construction of the sections of the machinery acts relied on by the defendants in the instant case, in support of their contention that by virtue of said sections, property belonging to or owned by a municipal corporation is not exempt from taxation by the State or by the political subdivision of the State in which such property is located, unless such property is held wholly and exclusively for a public purpose, we should hold that said section of the machinery acts, insofar as they have that effect, are unconstitutional and void.

BERRY v. ELLIS.

Considerations of policy urged by defendants in support of their contention on this appeal can have no place in the decision of the question involved in this case. When the General Assembly creates a municipal corporation, and by statute authorizes such corporation to acquire and hold property located anywhere in this State, such property, by constitutional provision, is exempt from taxation not only by the State, but also by any of its political subdivisions. The quality of exemption attaches to such property, as soon as it is lawfully acquired and remains with such property so long as it is owned by the corporation, without regard to the purpose for which it was acquired or was held.

There is no error in the judgment in the instant case. It is Affirmed.

W. J. BERRY v. ABRAHAM M. ELLIS.

(Filed 27 January, 1931.)

1. Process E a—Interest of mortgagee in mortgaged property is not sufficient to support attachment for purpose of acquiring jurisdiction.

Where the mortgagor is in possession of the lands in this State the interest of a nonresident mortgagee therein is not subject to attachment levied for the purpose of having the court obtain jurisdiction.

2. Chattel Mortgages A a — Contract will be construed as a chattel mortgage when in substance the agreement of the parties amounts thereto.

Where the written agreement between the parties is in legal effect a chattel mortgage it will be so construed though upon its face it purports to be a lease contract.

3. Process B f—Where attachment is void because property levied upon is insufficient to support writ the action will be dismissed.

Where a nonresident defendant has had his property in this State attached for the purpose of bringing him within the jurisdiction of our courts, and it is made to appear that his interest in the property was insufficient for a valid attachment, the action will be dismissed on his motion made in a special appearance for that purpose, when he has not otherwise been legally served and he has not waived his rights.

APPEAL by plaintiff from *Harris, J.*, at August Term, 1930, of DURHAM. Affirmed.

This is an action to recover the statutory penalty for usury (C. S., 2306), charged by defendant and paid by plaintiff on a loan of money, evidenced by notes executed by plaintiff and payable to defendant, in

BERRY *v.* ELLIS.

accordance with the provisions of two certain agreements in writing executed by both the plaintiff and the defendant.

The defendant is a nonresident of this State. Summons in this action was served on defendant in the city of Philadelphia, in the State of Pennsylvania, in accordance with the provisions of C. S., 491. No summons has been served on him personally in this State, nor has he entered a general appearance in the action, or otherwise waived service of summons.

On motion of plaintiff, a warrant of attachment commanding the sheriff of Durham County to attach and safely keep all the property of the defendant found in said county was issued in this action to the said sheriff on 13 February, 1930. The return of said sheriff endorsed thereon shows that under the said warrant of attachment, he levied on certain hosiery mill machinery located in Durham County, and fully described in said return. It is stated in the return that the defendant owns or claims an interest in said property. Notice of summons and warrant of attachment was duly published as required by statute. C. S., 485.

On 14 March, 1930, the defendant, through his attorneys, entered a special appearance in the action, solely for the purpose of moving that the levy of attachment on the property described in the return of the sheriff of Durham County, be vacated and the action dismissed, on the ground: (1) that the defendant is a resident of the State of New Jersey and has not been personally served with summons in this action, while in the State of North Carolina; and (2) that defendant has no interest in the property located in Durham County and described in the sheriff's return, which is subject to levy under a warrant of attachment.

Upon inspection of the two agreements in writing, executed by plaintiff and defendant, copies of which are attached to the complaint, as exhibits, the court was of opinion, and so found, that under the provisions of said agreements, as properly construed, the plaintiff is a mortgagor and the defendant a mortgagee with respect to the property described in said written agreements, which is the same property as that levied on by the sheriff of Durham County under the warrant of attachment issued in this action.

On the facts found by the court, and in accordance with its opinion that defendant has no interest in the property described in the sheriff's return to the warrant of attachment, which is subject to attachment, it was ordered and adjudged that the levy of attachment on said property be and the same was vacated, and thereupon the action was dismissed.

From this judgment, plaintiff appealed to the Supreme Court.

BERRY v. ELLIS.

*W. B. Umstead and McLendon & Hedrick for plaintiff.
Smith & Joyner and Pharr & Currie for defendant.*

CONNOR, J. The agreements in writing executed by the plaintiff and the defendant, with respect to the property described therein, which is the identical property on which the sheriff of Durham County has levied under the warrant of attachment issued in this action, although in the form of leases, by reason of the manifest purpose of the parties, as disclosed by the terms of said agreements, are in reality conditional sales agreements. If not so construed, the notes referred to therein are for rent, and not for money loaned, as contended by plaintiff. The defendant concedes that the transactions between the parties as shown by their agreements were not in reality leases; he contends that these transactions were sales of the property and that the notes are for purchase money. Both plaintiff and defendant rely, therefore, upon the construction of their agreements in accordance with which it must be held that they are conditional sales agreements. As so construed, the legal effect of each of said agreements is that the title to the property described therein remains in the defendant, the nominal lessor, only for the purpose of securing the payment of the notes executed by the plaintiff, the nominal lessee. It is expressly stipulated in each of said agreements, that upon the payment of said notes by the plaintiff, and of a relatively small sum of money in addition thereto, the title to said property shall vest in the plaintiff as purchaser.

In the leading case in this State of *Puffer v. Lucas*, 112 N. C., 377, 17 S. E., 174, the principle applicable in the construction of agreements such as those executed by the plaintiff and the defendant, in the instant case, is stated as follows: "Where the transaction between the parties is in reality and in its legal effect, a contract of sale conditional upon the payment of the purchase price in successive installments, it cannot be modified, nor its legal effect avoided, by the fact that they speak of it as a lease, and call the installments rent."

In *Hamilton v. Highlands*, 144 N. C., 279, 56 S. E., 929, it is said: "This Court has steadily adhered to this just and equitable construction of such contracts." See cases cited in the opinion.

Both *Puffer v. Lucas*, *supra*, and *Hamilton v. Highlands*, *supra*, have been frequently cited and approved in subsequent decisions of this Court and are conclusive authorities in support of the construction of the agreements of the parties to this action, under which it was held by the court below that the title of the defendant to the property on which the sheriff of Durham County levied under the warrant of attachment issued in this action, is that of a mortgagee. *Acceptance Corp. v. Mayberry*, 195 N. C., 508, 142 S. E., 767, and cases cited.

TRUST CO. v. LEWIS.

For this reason, it must be held that the interest of the defendant in said property was not subject to attachment. The statement of the law by Prof. McIntosh, in his "North Carolina Practice and Procedure," on page 934, is supported by the decisions of this Court. He says that the officer to whom a warrant of attachment has been issued "may levy upon the share of a tenant in common in personalty (*Ins. Co. v. Davis*, 68 N. C., 17); or upon the equity of redemption of a mortgagor of chattels (C. S., 677); but the interest of the mortgagee in the property contained in the mortgage is not subject to levy, such interest being only incident to his debt, which can be reached under garnishment proceedings. *Bowen v. King*, 146 N. C., 385, 59 S. E., 1044." In the latter case it is said: "In the absence of statutory provision, the interest of a mortgagee in personal property while the mortgagor remains in possession, having also an interest therein, is not subject to levy by direct seizure, either under attachment or execution." Freeman on Executions, secs. 118-184, 20 A. & E. Enc., 974. See, also, *Willis v. Anderson*, 188 N. C., 479, 124 S. E., 834, and *Stevens v. Turlington*, 186 N. C., 191, 119 S. E., 210.

In the instant case, the property on which the attachment was levied was at the time of the levy in the possession of the plaintiff, who under his agreement in writing with the defendant, had the right to such possession as a mortgagor, and also the right, both in law and in equity, to redeem said property by the payment of his notes held by the defendant, and thus become the absolute owner of the property.

The question discussed in the briefs as to whether a warrant of attachment against the property of a defendant in an action to recover a statutory penalty for usury may be granted, is not presented on this record. It has, therefore, not been considered or decided. See C. S., 798. There is no error in the judgment, It is

Affirmed.

PAGE TRUST COMPANY v. A. T. LEWIS, J. R. McQUEEN AND W. A. STUART; AND PAGE TRUST COMPANY v. A. T. LEWIS, J. R. McQUEEN, W. A. STUART AND L. T. WADDILL AND PAUL H. WADDILL, EXECUTORS OF J. E. WADDILL, DECEASED.

(Filed 27 January, 1931.)

1. Bills and Notes G c—Judgment by confession discharges maker of note but not endorsers and sureties thereon who are not parties.

A confessed judgment by the maker of a note merges the note in the judgment and operates as a discharge of the note as between the maker and the payee, but does not operate as a discharge of the endorsers or sureties on the note unless they are parties to the judgment.

TRUST CO. v. LEWIS.

2. Banks and Banking C b—Bank official has no authority to discharge endorsers on note upon confession of judgment by maker.

The vice-president, cashier, or other head official of a bank has no implied authority by virtue of his office to release the endorsers or sureties on a note upon the confession of judgment by the principal.

3. Bills and Notes D b—Parol agreement to discharge endorsers held unenforceable.

A parol agreement between an official of a bank that the bank would release the endorsers or sureties on a note upon the maker confessing judgment thereon is not enforceable, the agreement being in derogation of the written terms of the instrument. C. S., 3104.

4. Appeal and Error J g—Right of appellant to accounting held preserved on state of record in this case.

Where an insolvent corporation has executed to a bank its promissory note with endorsers thereon, and has submitted to a confession of judgment on the note for the purpose of releasing itself and its endorsers, but which did not have the effect of releasing the latter, if the endorsers have any remedy against the bank by accounting they may be presented through a referee appointed by the court to pass upon all claims that may be asserted against the corporation maker of the note.

ADAMS, J., took no part in the decision of this case.

CIVIL ACTION, before *Barnhill, J.*, at March Term, 1930, of MOORE.

Two actions were instituted by the plaintiff against the defendants to recover upon promissory notes aggregating \$25,000. The first suit involved a note of \$5,000 executed by the defendants, A. T. Lewis, J. R. McQueen and W. A. Stuart. The second suit was brought by the plaintiff, Page Trust Company, against A. T. Lewis, J. R. McQueen, W. A. Stuart, L. T. Waddill and Paul H. Waddill, executors of J. E. Waddill, deceased, to recover upon promissory notes, aggregating \$20,000, executed by Jennings Company and endorsed by said individual defendants. These two suits were consolidated and tried together.

The Jennings Motor Company was engaged in business in Moore County and held the Ford Agency in Carthage. J. R. McQueen was president of the company and A. T. Lewis and W. A. Stuart were officers thereof. The Motor Company had executed notes to the plaintiff Trust Company from time to time, aggregating \$20,000, and the individual defendants in the first suit had borrowed the sum of \$5,000 for the use of said company and had executed and delivered as evidence of the indebtedness their promissory note for \$5,000.

The corporation became insolvent, and on or about 13 February, 1928, there was a conference between the Page Trust Company and the Motor Company. At this conference it was agreed that the Motor Company should confess judgment in favor of the Trust Company for the total amount of the indebtedness, aggregating \$26,800. The confession

TRUST CO. v. LEWIS.

of judgment was duly entered by the clerk of the Superior Court of Moore County for said sum on 13 February, 1928. Thereafter execution was issued upon said judgment and levied upon the property of the corporation, and the same was advertised for sale on 1 March, 1928. Whereupon, certain creditors of the Motor Company instituted an action entitled *Cheek et al. v. Jennings Motor Company, Page Trust Company et al.*, for the purpose of having a receiver appointed for said Motor Company. The defendants "at the beginning of the trial admitted the endorsement of the notes set out in the complaint and admitted liability thereon except for the defenses set out in the answer." The defenses set out in the answer were to the effect that at the conference between the Page Trust Company and the officers of the Motor Company, it was understood and agreed that, if the Motor Company would confess judgment for the amount of the notes in favor of the Trust Company, the Trust Company would relieve and release the defendants as endorsers upon said notes of all liability thereon.

The following issues in the consolidated cases were submitted to the jury:

1. "Was the debt for which defendants were liable as endorsers as set out in the complaint, paid off and discharged, as alleged in the answer?"

2. "In what sum, if anything, are defendants indebted to the plaintiff?"

The trial judge instructed the jury to answer the first issue "No," and by consent of the parties the court answered the second issue in the amount of indebtedness claimed by the plaintiff.

A stipulation signed by counsel appears in the record to the effect that Walter E. Porter was appointed permanent receiver of the Motor Company; that all assets of the company were sold by said receiver by order of court and purchased by John Nichols for the sum of \$10,010; that said sale has been approved by the court and the receiver ordered to make a deed or bill of sale for said property to the said Nichols upon the payment of the purchase price, and that the receiver has in hand subject to the further order of the court the said sum of money. The stipulation further shows that an order was duly made by the court appointing H. N. Robbins referee to pass upon all claims against the Motor Company.

Judgment was entered upon the verdict and the trial judge also entered the following order:

"There is expressly reserved from the operations of the judgment entered in this cause, at this term, the equity or equities, if any, of the defendants to an accounting by the Page Trust Company and John Nichols, either or both, for the value of the assets of the Jennings Motor

TRUST CO. v. LEWIS.

Company purchased at the receiver's sale; and said judgment shall not operate as an estoppel in regard thereto; the verbiage of this paragraph is without prejudice to or effect upon the rights or liabilities of the parties upon such accounting."

From the foregoing judgment the defendants appealed.

U. L. Spence for plaintiff.

Hoyle & Hoyle for defendant.

BROGDEN, J. 1. Does a confession of judgment by the maker of a promissory negotiable note release and discharge the liability of the endorsers of said note, who are not parties to said confession of judgment?

2. Is an oral agreement valid and enforceable between the vice-president of a bank, which holds negotiable promissory notes, executed by a corporation, and the endorsers of said notes, who are officers of the corporation, that the bank will release said endorsers from all liability on the notes if such endorsers will procure a confession of judgment in favor of the bank by the corporation?

The law answers the first question in the negative. *Bank v. Lumber Co.*, 123 N. C., 24, 31 S. E., 348. In that case a confessed judgment was involved and the Court said: "Between the parties to an action wherein a judgment is rendered the judgment is a merger and the note or instrument sued upon is extinguished; but as to sureties or endorsers who are not parties to the judgment, there is no merger or extinguishment of the note or instrument."

Likewise, the law answers the second question in the negative. *Bank v. Lennon*, 170 N. C., 10, 86 S. E., 715; *Bank v. West*, 184 N. C., 220, 114 S. E., 178; *Manly v. Beam*, 190 N. C., 659, 130 S. E., 633. C. S., 3104. *Bank v. Clark*, 198 N. C., 169, 151 S. E., 102. In the *Lennon* case, *supra*, the Court held that the cashier of a bank had no power to release the liability of a party upon a note upon the payment of a certain sum by another party to the same instrument upon the ground that such an agreement was without consideration, and upon the further ground that the "cashier had no power or authority to make such agreement as . . . alleged, by virtue of his office and no express authority is shown." Moreover, under the provisions of C. S., 3104 a verbal renunciation is ineffective. Thus, in *Manly v. Beam*, *supra*, the Court said: "The note sued on in this action is a negotiable instrument; plaintiff is the holder of said note; it has not been delivered up to the person primarily liable; a renunciation of her right to hold defendant liable on the note as one of the makers, in order to avail defendant, as a defense to an action against him on the note, must be in writing. A parol renunciation is not sufficient."

McLESKEY v. HEINLEIN.

In the case at bar the trial judge appointed a referee to pass upon all claims that may be asserted against the Motor Company. Hence, if the defendants have any right to assert against the Page Trust Company upon an accounting, such right is fully preserved. Therefore, we hold that upon the record the ruling of the trial judge was correct.

Affirmed.

ADAMS, J., took no part in the decision of this case.

J. H. McLESKEY v. J. F. HEINLEIN.

(Filed 27 January, 1931.)

Deeds and Conveyances C g—Held: character of development had not so changed as to warrant equity to declare restrictions inoperative.

Restrictive covenants in deeds against the use of the property for other than residential purposes will not be strictly enforced when the character of the surrounding land has been so substantially changed by the growth of the city as to make the enforcement of the restrictions inequitable and unjust, but in this case *held*: the facts found do not show such substantial change in the character of the neighborhood as to call for the operation of this equitable rule, and the restrictions are enforceable, and the fact that a few of the owners of lots near the plaintiff's property had released their rights to insist upon the observance of the restrictions and that the development was divided into separate subdivisions is insufficient to change this result.

CIVIL ACTION, before *Harwood, Special Judge*, at October Term, 1930, of MECKLENBURG.

The cause was submitted upon facts agreed, from which it appears that on 2 August, 1930, the plaintiff and the defendant entered into a certain written contract whereby the plaintiff agreed to lease to the defendant lot No. 12, Block E, of Myers Park, made 16 December, 1912, and recorded in Book 230, page 123. The proposed lease provided that the lessee should have possession and use of said lot, free and clear "of building restrictions and restrictions affecting the use and occupancy thereof for business purposes for a period of five years," etc. The defendant agreed to lease the property, but when the plaintiff tendered the lease, the defendant refused to accept it upon the ground that the plaintiff "did not have or could not convey to the defendant the unrestricted use and occupancy of said lot," etc.

The facts upon which the defendant refused to accept the lease were substantially as follows:

MCLESKEY v. HEINLEIN.

1. That the Stephens Company, the original owner of a large acreage covering the *locus in quo*, had subdivided the property into various blocks and lots, and thereafter conveyed said property, including the *locus in quo*, by deeds containing restrictions (a) "that the property shall be used for residence purposes only and shall be occupied and owned by people of the white race only"; (b) a number of other restrictions not pertinent to this controversy.

Block E, of Myers Park plat, contains thirteen lots. Said lot No. 12 fronts on the Providence Road. Upon said Providence Road business development has become very active, so that on the property adjoining the property of plaintiff a large store building, containing two grocery stores and one drug store over which there is a public dance hall, has been erected. South of the *locus in quo* "and for a distance of approximately 2,500 feet a considerable portion of the property fronting on the Providence Road is unrestricted and has commanded a high price on account of the fact that all of the unrestricted portion may and part of it is now being used for business purposes; and on said Providence Road to the south of the *locus in quo* and a distance of approximately 1,100 feet, there is located a miniature golf course; that to the south of said golf course on said Providence Road, a distance of approximately 1,500 feet from the *locus in quo*, is located a large gasoline filling station; that to the south of the said filling station a distance of approximately 1,600 feet from the *locus in quo* is located seven mercantile stores; that to the south of said seven stores and a distance of approximately 2,500 feet from the *locus in quo* on said Providence Road are located three grocery stores; that on said Providence Road, and approximately 500 feet to the north of the *locus in quo*, is located the property known as the Home Place of Mac. D. Watkins, fronting approximately 500 feet on said Providence Road, which is unrestricted."

The owners of lot No. 13, fronting Providence Road, and adjoining the *locus in quo*, have executed a release, releasing the lot of plaintiff "from any and all restrictions, restricting or limiting its use and occupancy for business purposes save that it shall be occupied and owned by people of the white race only."

The owners of lots 2, 3, 4, 5, 6, 8, and 12 in said block have released to the owner of lot 13 for the purpose of permitting the owner of said lot 13 to erect an art studio on said lot "to do any and everything necessary to the proper conduct of the business of a photographer."

The cause was heard and the following judgment entered:

"This cause, coming on to be heard before his Honor, J. H. Harwood, judge presiding at the October Special Term, 1930, of the Superior Court of Mecklenburg County, and being heard upon the pleadings and agreed statement of facts submitted by the parties as appears in the

McLESKEY v. HEINLEIN.

record; and the court being of the opinion and finding as matters of legal inference upon the facts so agreed:

"That, on account of the growth and expansion of the city of Charlotte, the extension of its business district; the establishment and operation of business property immediately adjacent to the *locus in quo* and the property shown on said Block E, fronting on the Providence Road; that the owner of lot No. 13, the only other lot in said subdivision fronting on said Providence Road, has by a proper release, released the *locus in quo* of any and all conditions and restrictions limiting or affecting its use and occupancy for business purposes; that each block or subdivision in the development known as Myers Park was developed as a separate unit; that the Stephens Company has conveyed all the lots shown on said Block E, and does not own any property in close proximity to said Block E; that the character of the property fronting on the Providence Road immediately adjacent to the *locus in quo* and the subdivision known as Block E, has so changed as to make it impossible to accomplish the purposes intended by the restrictive covenants set out in the original deeds conveying the property fronting on said Providence Road all as set out in the agreed facts.

"That, by reason of the changed conditions aforesaid, it is inequitable and unjust, and detrimental to the market value of the property, to require the enforcement of said restrictions and that the property of the plaintiff described in the complaint is no longer subject to said restrictions.

"It is, therefore, ordered, adjudged and decreed that the defendant specifically perform his contract with plaintiff for the lease of said premises and that plaintiff recover of the defendant the costs of this action, to be taxed by the clerk."

From the foregoing judgment the defendant appealed.

J. L. DeLaney for plaintiff.

Brock Barkley for defendant.

BROGDEN, J. There is no new or novel proposition of law presented by the record. The sole question is whether under the agreed facts the case is controlled by *Johnston v. Garrett*, 190 N. C., 835, 130 S. E., 835, or *Starkey v. Gardner*, 194 N. C., 74, 138 S. E., 408. This Court has held "that the subdivisions of Myers Park are each a separate, distinct and integral development." *Stephens Co. v. Homes Co.*, 181 N. C., 335, 108 S. E., 233; *Johnston v. Garrett*, 190 N. C., 835.

When persons desiring to become home owners purchase property in a subdivision protected by certain desirable restrictive covenants, the security of such covenants ought not to be destroyed by slight departures

HAYES v. LANCASTER.

from the original plan, and valid restrictions appearing in all the deeds for lots in such subdivision should not be eliminated and wiped out because of immaterial violations of such restrictions. One of the essential tests prescribed, for determining whether restrictions should be eliminated was thus expressed in *Starkey v. Gardner, supra*: "However, it is equally true that if the character of the community has been changed by the expansion of a city and the spread of industry or other causes resulting in a substantial subversion or fundamental change in the essential character of the property, then, in such cases, equity will not rigidly enforce the restriction."

Therefore, the paramount question is whether the facts in the case at bar bring the controversy within the principle applied in the *Starkey case*. There is no fact tending to show any violation of the restriction within the subdivision itself, except the fact that the owners of seven lots have signed releases in order to permit the owner of lot 13 to erect an art studio on said lot. The nature of such building does not appear. However, we are of the opinion that the evidence does not show such "substantial subversion or fundamental change in the essential character of the property" as to warrant the removal of the restrictions.

Reversed.

JULIUS HAYES v. JUNE J. LANCASTER.

(Filed 27 January, 1931.)

1. Assault A a—Definition of assault and battery.

An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of the blow, it being without the consent of the person on whom the offer of violence was made or who actually received the blow, the combination of the two being denominated assault and battery in law.

2. Limitation of Actions C d—Mental disability resulting from assault is defense to plea of statute of limitations.

An action is commenced upon the issuance of a summons, C. S., 404, and an action for assault and battery is barred upon the plea of the statute, C. S., 443, if not commenced within one year, but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity occasioned by the blow the defendant inflicted upon him, the time of such disability will be deducted from the running of the statute. C. S., 407.

3. Appeal and Error J d: J e—Burden is on appellant to show substantial or prejudicial error.

On appeal the presumption is against the appellant and the burden is on him to show clearly not only that error was committed in the lower court, but that it was substantial or prejudicial.

HAYES v. LANCASTER.

APPEAL by defendant from *Johnson, Special Judge*, and a jury, at June Term, 1930, of DURHAM. No error.

This is an action brought by plaintiff against the defendant to recover damages for an alleged serious and deadly assault and battery, made by defendant on plaintiff, which occurred 8 January, 1927, in the restaurant of plaintiff, a negro, in Louisburg, N. C.

The defendant, answers, and, in part, says: "When defendant and his friends had finished eating, defendant handed to plaintiff a \$10.00 bill, out of which to take the charges for his services, thereupon the plaintiff undertook to charge the defendant \$4.00 for his services in preparing and serving said oysters, to the three people, this was unlawful and a highly unreasonable charge. The price of an oyster stew in the town of Louisburg, having never in its history exceeded the sum of fifty cents per bowl, and defendant remonstrated with plaintiff for his attempt to so defraud and cheat him. Plaintiff then became enraged and seized a fork and was advancing upon this defendant with the fork drawn and was in the act and point of assaulting this defendant, when this defendant, acting strictly in his own defense, took up a bottle of catsup, which was on the table and struck the plaintiff on the head with it. This caused the plaintiff to desist from his attempted assault and the defendant and his friends thereupon left the restaurant and immediately afterwards reported the matter to an officer of the town of Louisburg." The defendant also pleaded the statute of limitation: "That more than one year has elapsed since the cause of action set forth in the complaint herein accrued prior to the bringing of this action, and the said cause of action is therefore barred by the statute of limitations as contained in the Consolidated Statutes of North Carolina, and the said statute of limitations is hereby expressly pleaded in bar of plaintiff's right to recover in any event in this action."

The plaintiff, in reply, says: "That if the lapse of time between the wrongful act done the plaintiff and the time of instituting this suit exceeds that period barred by the statute of limitations, that said delay in bringing said action by plaintiff was due to the fact that he was mentally incapacitated to bring a suit as the result of the injury and damage done him by defendant, and plaintiff respectfully states that defendant should not be permitted to profit by his own wrong and the statute of limitations does not apply in such cases."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is plaintiff's right of action barred by the statute of limitations as alleged in the answer? Answer: No.

2. Did the defendant unlawfully and wrongfully assault and beat the plaintiff as alleged in the complaint? Answer: Yes.

HAYES v. LANCASTER.

3. If so, was such act of the defendant wilful and malicious as alleged in the complaint? Answer: Yes.

4. What compensatory damages, if any, is the plaintiff entitled to recover of the defendant? Answer: \$1,400.

5. What sum, if any, is the plaintiff entitled to recover of the defendant as punitive damages? Answer:"

The court below rendered judgment on the verdict. The record contains 116 pages—plaintiff's brief 17 pages and defendant's brief 18 pages. The defendant made numerous assignments of error and appealed to the Supreme Court.

*R. O. Everett, Victor S. Bryant and John W. Hester for plaintiff.
Yarborough & Yarborough for defendant.*

CLARKSON, J. An assault is defined: "An attempt or offer to beat another, without touching him; as if one lifts up his cane or his fist in a threatening manner at another; or strikes at him, but misses him." 3 Black. Comm., 120; 3 Steph. Comm., 469; *S. v. Williams*, 186 N. C., 627.

Battery: "Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent." 2 Bish. Crim. Law, sec. 71. The actual offer to use force to the injury of another person is *assault*; the use of it is *battery*; hence the two terms are commonly combined in the term "assault and battery."

C. S., 404: "An action is commenced as to each defendant when the summons is issued against him."

C. S., 407: "Disabilities—A person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, who is at the time the cause of action accrued, either (1) within the age of twenty-one years; or (2) insane, etc. May bring his action within the times herein limited, after the disability is removed," etc.

C. S., 443: "Within one year an action—(3) For libel, assault, battery, or false imprisonment."

This action was brought for assault and battery a year after the occurrence. Defendant pleaded (1) justification—self-defense (2) one-year statute of limitations. Plaintiff replied and set up insanity to repel the one-year statute of limitations. Perhaps no more simple action than that for assault and battery can be brought in the courts and tried than the present one. As to the charge on the question of insanity, taking the contentions on this aspect, with the charge, we think it sufficient, and if more particularity was desired by defendant, a prayer for instruction should have been requested.

MANGUM v. BROWN.

The record is long, as the contest was one primarily of fact, and the battle was waged and fought out before the jury mainly upon the questions of fact. On the record the jury could have decided either way, but decided all the facts in the plaintiff's favor. This is for them and not us. After hearing the arguments, and examining the records and briefs, we find on the whole record no prejudicial or reversible error.

In re Ross, 182 N. C., at p. 478, citing numerous authorities, we find the well settled rule in this jurisdiction, as follows: "It is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. Our system of appeals, providing for a review of the trial court on the questions of law, is founded upon sound public policy and appellate courts will not encourage litigation by reversing judgments for slight error, or for stated objections, which could not have prejudiced the rights of appellant in any material way. . . . Again, error will not be presumed; it must be affirmatively established. The appellant is required to show error, and he must make it appear plainly, as the presumption is against him." *In re Will of Efrid*, 195 N. C., p. 91-2.

"Even so the tongue is a little member, and boasteth great things. Behold, how great a matter a little fire kindleth." James 3: 5.

In the judgment of the court below, in law we find
No error.

JOHN D. MANGUM v. F. P. BROWN, TRADING AS H. J. BROWN COMPANY.

(Filed 27 January, 1931.)

1. Evidence K b—Witnesses may testify from own observation as to mental condition of party when material to the inquiry.

In an action to recover damages in a negligent personal injury case wherein the plaintiff signed a release and the controlling question is whether he at the time of his signing had sufficient mental capacity to be bound thereby, witnesses from their own observation may testify as to the plaintiff's mental condition both before and after the time of his signing, as evidence of his mental incapacity when he signed the release in question.

2. Torts C c—Burden is on plaintiff signing release to prove mental incapacity when relied on by him.

The burden is on the plaintiff who has signed a release to prove his mental incapacity to have executed it when relied upon by him to set the release aside.

MANGUM v. BROWN.

3. Trial D a—Where there is more than scintilla of evidence defendant's motion as of nonsuit should be denied.

Where there is more than a scintilla of evidence to support the plaintiff's allegations the case must be submitted to the jury and defendant's motion as of nonsuit will be denied, the effect of the motion being that of a motion to dismiss.

4. Torts C c—Evidence of plaintiff's mental incapacity to sign release held sufficient to go to the jury.

Where the plaintiff seeks to set aside his release of the defendant from the consequences of the latter's negligence, evidence that before the injury the plaintiff's mind had been normal and that at the time of the trial and previously he talked and acted like a child, that his memory and business capacity had failed him, is sufficient to take the case to the jury upon the question of plaintiff's mental incapacity at the time he signed it.

5. Same—Verdict establishing mental incapacity to execute release entitles plaintiff to have it set aside, and undue influence becomes immaterial.

Where the issue as to the mental capacity of the plaintiff to execute a release binding upon him has been found by the jury in the plaintiff's favor, the answer to the issue relating to undue influence becomes immaterial.

CONNOR, J., dissents.

APPEAL by defendant from *Daniels, J.*, at March Term, 1930, of WAKE. No error.

Action for damages for personal injury. The defendant is an undertaker in Raleigh. In his place of business there is an elevator used in carrying freight between the basement and the top floor. One side of the elevator was not inclosed or protected by any gate, railing, or other guard, and between this side and the wall there is a vacant space of "three, four, or five feet." In March, 1928, while the carriage was going from the basement to the second floor, or after it had reached the second floor, the plaintiff fell through the opening and suffered personal injuries, including a fracture of the skull. About three weeks before this time the defendant's heating plant had exploded and hurled the plaintiff to the ceiling, and had thereby inflicted injuries which were afterwards found to be of a minor nature.

After his fall from the elevator the plaintiff was taken to a hospital and was treated by a physician and an eye specialist. He was there several weeks. He contended that at first he was unconscious, later semiconscious a part of the time, and not mentally clear at the time he left the hospital. The defendant contended that his mind was unimpaired.

On 2 October, 1928, the plaintiff signed a paper purporting to be a release of the defendant, his agents, and employees from all liability.

MANGUM v. BROWN.

The defendant answered and put in issue the plaintiff's material allegations, and at the trial the jury returned the following verdict:

1. Did the plaintiff, Mangum, execute the release set out in the answer? Answer: Yes.

2. Did plaintiff, Mangum, at the time he executed the release have sufficient mental capacity to know the nature and effect of what he did? Answer: No.

3. Was the execution of said release procured by fraud or undue influence, as alleged in the reply? Answer: Yes, by undue influence—no fraud.

4. Was the plaintiff injured by negligence of defendant, as alleged in the complaint? Answer: Yes.

5. Did plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

6. What damages, if any, is plaintiff entitled to recover of defendant? Answer: \$7,500.

Judgment for the plaintiff, and appeal by the defendant upon exceptions reserved.

Gatling, Morris & Parker for plaintiff.

Ruark & Ruark and Carroll W. Weathers for defendant.

ADAMS, J. The questions raised by the appeal as set forth in the appellant's brief (Rule 27½) involve the competency of evidence tending to show the plaintiff's mental condition after the execution of the release, and the adequacy of the evidence to support the jury's answer to the second and third issues. They do not involve the fourth, fifth, and sixth issues.

In his first fourteen assignments of error the appellant contends that the questions and answers therein excepted to are not referable to the time the release was executed but only to subsequent and unrelated periods. This is not our understanding of the record. The witnesses to whose testimony the exceptions were taken expressed an opinion based upon their observation and association with the plaintiff as to the condition of his mind before and after his fall from the elevator, and the trial court announced in the presence of the jury that this class of evidence was to be considered as bearing upon the plaintiff's mental condition at the time of his fall as well as the time when he signed the release. We see no satisfactory reason for excluding the evidence. These principles are elementary: (1) evidence of prior and subsequent mental conditions is admissible in ascertaining a person's mental condition at the precise time of the act in issue; (2) a witness who has had opportunity and occasion to know and observe a person whose sanity is impeached may depose to facts and may express an opinion, based

MANGUM v. BROWN.

upon his knowledge and observation, as to the mental condition of such person; (3) while evidence of previous insanity of a temporary character may not raise a presumption of continued insanity it may be considered by the jury in connection with other evidence in determining an issue as to a person's mental capacity. *Clary v. Clary*, 24 N. C., 78; *Bost v. Bost*, 87 N. C., 477; *Horah v. Knox*, *ibid.*, 483; *Beard v. R. R.*, 143 N. C., 136; *Rakestraw v. Pratt*, 160 N. C., 436. The court's refusal to exclude the evidence to which these assignments relate is sustained upon the principle enunciated in these and similar cases. -

The fifteenth, sixteenth, and seventeenth assignments are addressed to the denial of the appellant's motion to dismiss the action as in case of nonsuit. The plaintiff admitted the execution of the release and therefore had the burden of proving that the instrument was not binding because of his mental incapacity. He offered evidence for this purpose, but the appellant contends that it is not sufficient in any view to sustain or justify an affirmative answer to the second issue.

In effect the appellant's motion for nonsuit was a demurrer to the evidence, which must be considered most favorably for the plaintiff and most strongly against the defendant. It is almost needless to repeat the truism that where there is more than a scintilla of evidence tending to support the plaintiff's contention the issue must be submitted to the jury. *Cromwell v. Logan*, 196 N. C., 588; *Inge v. R. R.*, 192 N. C., 522; *Lindsey v. Suncrest Lumber Co.*, 189 N. C., 118; *Standard Oil Co. v. Hunt*, 187 N. C., 157; *Gates v. Max*, 125 N. C., 139.

We have minutely examined the testimony relating to the plaintiff's mental capacity before and at the time of the injury and at the time he signed the release. We are not concerned with the question whether the testimony should satisfy a jury of his incapacity to execute the release but with the question whether there was sufficient evidence to warrant a finding by the jury on this point. We think there was. There was evidence that before the injury the plaintiff's mind had been normal; that at the time of the trial and previously he had become very much like a child; that he frequently acted and talked as a child; that his memory had failed; that his capacity to transact business had become impaired; and that his mind did not seem to function. In these circumstances we cannot conclude as a matter of law that the matters involved in the second issue should have been withheld from the jury.

The evidence of undue influence is not convincing; but if the third issue be disregarded, the plaintiff is entitled to judgment on the issues that remain.

The remaining exceptions are formal.

No error.

CONNOR, J., dissents.

MOORE v. STATE.

HAROLD A. MOORE, EMPLOYEE, v. STATE OF NORTH CAROLINA,
SELF-INSURER.

(Filed 27 January, 1931.)

1. Master and Servant F i—Findings of fact of Industrial Commission are binding on courts, but not findings or admissions of law.

Where there is an admission contained in the report of the Industrial Commission passing upon the question of awarding compensation to an employee of the State, that the employee was in the employment of the State and that the accident arose out of and in the course of the employment, these being admissions as to the law upon the facts, the courts will disregard them.

2. Master and Servant F a—A person is an employee under the act if engaged in work under any appointment or contract of hire.

The State is its own insurer under the provisions of the Workmen's Compensation Act, and is bound by its provisions, and where the question is whether the appellant is an employee thereunder it may be resolved in the employee's favor in two ways: whether his employment arose under a contract or under a power of appointment authorized or binding upon the State or any of its political subdivisions.

3. Same—One appointed by county forest warden to assist in fighting forest fire is an employee of the State within meaning of act.

A forest warden of a county is given statutory authority to appoint persons between certain ages to assist him in fighting forest fires with pain of penalty upon refusal, C. S., 6136, 6137, and a person so appointed is entitled to receive a small hourly compensation for the services so rendered, and one so appointed is an employee of the State within the meaning of the Workmen's Compensation Act, and is entitled to compensation thereunder for an injury received in the course of and arising out of his duties imposed by such appointment.

APPEAL by defendant from *Cowper, Special Judge*, at September Term, 1930, of WAKE.

This is a claim for compensation for loss of the plaintiff's left eye caused by its being struck by a bush while he was helping to extinguish a forest fire. The record contains this entry: "It was admitted that the plaintiff was in the employment of the Department of Conservation and Development at the time of the injury; that the accident arose out of and in the course of the employment, leaving for determination only the one question, to wit, the amount of the average weekly wage of the claimant."

The findings of fact are as follows:

1. At the time of the accident the claimant was acting as assistant to Everett Bryson, who was the duly appointed forest warden for the

MOORE v. STATE.

particular district, and who had summoned the claimant in pursuance of the authority given him by section 6137 of the North Carolina Code.

2. While so engaged the claimant was injured in the eye, which resulted in the complete loss of vision.

3. The claimant was engaged as assistant, under summons, of the forest warden, in the extinguishment of the forest fire for the period of five hours, for which he received compensation at the rate of 20 cents per hour.

4. The average weekly wage of the claimant in his civil vocation exceeded \$30 per week.

5. It is impracticable to compute the average weekly wage of this claimant in accordance with the general rule of subsection (e), section 2, and that the application of said rule to the instant case would be unfair to the claimant on account of the exceptional circumstances of his employment."

The Industrial Commission awarded the plaintiff compensation in the sum of eighteen dollars a week for one hundred weeks, and all medical and hospital bills, including an artificial eye, as provided by section 25 of the Workmen's Compensation Act. On appeal, the Superior Court affirmed the judgment of the Industrial Commission. The defendant excepted and appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for appellant.

M. A. James for appellee.

ADAMS, J. The award of the Industrial Commission is conclusive and binding as to all questions of fact. Workmen's Compensation Law (P. L. 1929, ch. 120), sec. 60. Whether an injury by accident has arisen out of and in the course of a person's employment is a mixed question of law and fact, and while the parties to an action or proceeding may admit or agree upon facts they cannot make admissions of law which will be binding upon the courts. *Rawlings v. Neal*, 122 N. C., 173; *Binford v. Alston*, 15 N. C., 351. If, therefore, the facts as found do not show that the plaintiff was an employee of the State as defined in section 2(b) or that his injury is such as is defined in section 2(f), the admission on these points may be disregarded.

The award was based upon these facts: A forest warden in Buncombe County had summoned the plaintiff to assist others in subduing a forest fire, and the plaintiff, while thus engaged for a period of five hours (for which he received twenty cents an hour) suffered an injury to his left eye which resulted in the total loss of its vision. It is contended by the defendant that these facts do not justify the award for

MOORE v. STATE.

the asserted reason that the plaintiff was not an employee of the State within the meaning of the Workmen's Compensation Law. The act defines an "employee" as every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, but excludes persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of the employer. As relating to those so employed by the State, the term "employee" includes all officers and employees of the State, except such as are elected by the people or by the General Assembly, or appointed by the Governor. The words "those so employed by the State" manifestly refer to persons who are "engaged in an employment under any appointment or contract of hire or apprenticeship." With respect to political subdivisions of the State the term "employee" includes all officers and employees thereof, except such as are elected by the people or by the council or governing body of such political subdivision, who act in purely administrative capacities and are to serve for a definite term of office. Section 2(b).

It will be noted that the inquiry which immediately concerns us is whether the plaintiff at the time of his injury was an employee of the State within the meaning of the law. By the terms of the statute he was an employee if he was "engaged in an employment under any appointment or contract of hire." This phrase embodies the two notions of an employment under an appointment and an employment under a contract of hire. Disregarding the theory of a contract of hire we must determine whether the plaintiff was engaged in an employment under an appointment made by a political subdivision of the State.

In 1925 the duties theretofore discharged by the State Geological and Economic Survey were vested in the Department of Conservation and Development. P. L. 1925, ch. 122, sec. 22. The State Board of Conservation and Development is authorized to provide for the prevention and control of forest fires. With the approval of this board the State forester, who is *ex officio* the State forest warden, may appoint one county forest warden and one or more deputy forest wardens in each county of the State if deemed advisable and necessary. C. S., 6133, 6134. Everett Bryson had been appointed forest warden of Buncombe County and had been charged with the performance of prescribed duties. He had charge of measures for controlling forest fires; he was clothed with power to make arrests for the violation of forest laws; and while engaged in extinguishing forest fires he had control and direction of persons and apparatus. He has authority to summon any male resident between eighteen and forty-five years to assist him; and if a person summoned is physically able to assist and refuses or neglects to do

MOORE v. STATE.

so he is guilty of a misdemeanor. C. S., 6136, 6137. The forest warden may be compensated at a rate not exceeding thirty cents an hour, and the plaintiff was paid twenty cents an hour for the time he was actually engaged.

If the fire warden had himself been injured while performing his duties his right to compensation would hardly be questioned. Was not the plaintiff equally engaged in the employment of the State? He and the warden were engaged in the same service—the extinguishment of the fire. The fact that he was serving the State by the command or appointment of the warden does not change the nature of the service; he was acting in the capacity of a temporary warden by authority and, indeed, by the mandate of the law. 18 R. C. L., 577.

The question has been considered in other jurisdictions. In *West Salem v. Industrial Commission*, 162 Wis., 57, William Voeck was called by the village marshal to assist an officer who had taken into custody upon a justice's warrant a man who was armed with a pistol. When assisting the officer Voeck was shot and killed by the prisoner. In holding that the deceased was entitled to an award under the Compensation Act, the Court said: "The marshal's acts constituted in the law a command to Voeck to assist in the execution of the criminal law under the provisions of section 884, Stats. 1913, and refusal to comply therewith would have subjected him to the penalties of section 4488, Stats. 1913. By command of the village marshal Voeck was required to perform duties of the same kind as those of the marshal, namely, police duties to suppress a breach of the peace and to enforce the criminal law. The transaction in fact conferred on Voeck the powers and duties of a police officer for the purposes and the exigencies of the occasion. From this it logically follows that Voeck was engaged with the marshal in performing police duties in the village at the marshal's command. The duties and powers thus imposed on him under authority of the village marshal, by force of the statutes, constituted an appointment of Voeck to perform police service for the village. *State ex rel. Brown v. Appleby*, 139 Wis., 195, 120 N. W., 861; *McCumber v. Waukesha Co.*, 91 Wis., 442, 65 N. W., 51; 3 Cyc., 877; 2 Ruling Case Law, p. 491, par. 52. The result is that Voeck acquired the status of a police officer of the village and was engaged in the execution of the criminal law at the time of his death."

Upon a similar state of facts the same conclusion was reached by the Supreme Court of California in an exhaustive opinion in which, concerning the death of one who was assisting an officer, it was said: "The service rendered by the deceased by no means excluded him from the definition of the term employee. That he was acting in the course of the business or occupation of the sheriff there is no room for ques-

TRUST CO. v. CONSTRUCTION CO.

tion, and that he was in the service of his employer by appointment by the sheriff, who was the county's legally authorized officer or agent in such cases, is beyond cavil."

A similar view was expressed in *Millard County v. Industrial Commission*, 217 Pac. (Utah), 974.

The principle applies to the case before us. While assisting in subduing the fire the plaintiff was engaged in an employment under appointment by the forest warden and, as held by the Industrial Commission and by the Superior Court on appeal, he was an employee within the meaning of the Compensation Act.

There is no exception to the method of computation.

Judgment affirmed.

WACHOVIA BANK AND TRUST COMPANY v. J. F. MULLIGAN
CONSTRUCTION COMPANY ET AL.

(Filed 27 January, 1931.)

Principal and Surety B b—Surety is not liable to lender of money used to pay laborers when lender does not obtain assignment.

Money loaned a contractor building a State highway, evidenced by the contractor's note specifying that it was to be used for the payment of laborers and materialmen in the construction of the road, is not included within the terms of the statutory surety bond of the contractor, and the surety is not liable therefore although the money was actually used as agreed in the note, unless the lender obtains an assignment from the laborers and materialmen of their rights.

APPEAL by Southern Surety Company from *Harding, J.*, at March Term, 1930, of WATAUGA.

Civil action in the nature of a creditors' bill, brought under 3 C. S., 3846(v), to recover from surety on contractor's bond, moneys loaned to contractor for use in carrying on work of construction.

The Surety Company lodged a motion for judgment as of nonsuit at the close of plaintiff's evidence, which was overruled, and the case was, thereupon, tried on the following determinative issues:

"3. Did the defendant, J. F. Mulligan Construction Company, execute the note to plaintiff, dated 6 April, 1928, for \$2,744.38 for money to be used for payrolls for labor performed on road project No. 7720, as alleged in the complaint? Answer: Yes (by consent).

"4. Was it stipulated in said note that said money was to be used in payment of payroll for labor on project No. 7720, as alleged in the complaint? Answer: Yes (by consent).

TRUST CO. v. CONSTRUCTION CO.

"5. Were the proceeds of said loan, if made, used by J. F. Mulligan Construction Company in payment for labor and material bills used or performed in the construction of project No. 7720? If so, what amount? Answer: Yes, \$2,744.38.

"6. In what amount, if any, is defendant, Construction Company, indebted to the plaintiff bank? Answer: \$2,744.38, with interest from 23 September, 1928.

"7. What amount, if any, is the defendant, Southern Surety Company, indebted to the plaintiff by virtue of its surety bond to J. F. Mulligan Construction Company? Answer: \$2,744.38, with interest from 23 September, 1928."

Judgment on the verdict for plaintiff, from which the defendant, Southern Surety Company, appeals, assigning errors.

John L. Rendleman and Hayden Clement for plaintiff, Wachovia Bank and Trust Company.

A. J. Fletcher and Ruark & Ruark for defendant, Southern Surety Company.

STACY, C. J. On 23 September, 1927, the J. F. Mulligan Construction Company, contractor, entered into a written contract with the State Highway Commission to construct or improve a section of road in Watauga County, known as project No. 7720; and to insure compliance with the terms of said agreement, the State Highway Commission took from the contractor, as principal, and the Southern Surety Company, as surety, a bond in the sum of \$43,800 conditioned, among other things, on the faithful performance of said contract, and that the contractor "shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway."

On 6 April, 1928, the contractor borrowed from the plaintiff the sum of \$2,744.38 for use in paying laborers for work done on, or in and about, said roadway, and executed its note therefor in which it was stipulated that said funds were to be so used, and they were actually so employed.

The case, therefore, presents the question as to whether the bond in suit is broad enough to cover moneys loaned by plaintiff to the contractor for use in paying laborers for work done on, or in and about, said roadway, when the note executed by the contractor to the plaintiff shows on its face that said funds were to be so used, and they were actually so employed. We think not. *Snelson v. Hill*, 196 N. C., 494, 146 S. E., 135; *Hardaway v. Nat. Surety Co.*, 211 U. S., 552; *United*

STATE v. HERRING.

States for use of Fidelity Nat. Bank v. Rundle, 107 Fed., 227, 52 L. R. A., 505; *Nat. Surety Co. v. Jackson County Bank*, 20 Fed. (2d), 644.

It is conceded that the authorities, just cited, are in support of the position that a bank furnishing money to a contractor doing public work, for use in paying the claims of laborers and materialmen, without taking assignments of such claims, does not come within the protection of a statutory bond conditioned to pay all persons supplying the principal with labor or materials in the prosecution of his work. But plaintiff says the opinion in *Bank v. Clark*, 192 N. C., 403, 135 S. E., 123, gives decided intimation to the contrary, when the note given by the contractor shows on its face that the funds so borrowed are to be used in the prosecution of the work. We do not so understand the limiting expressions contained in said opinion, which were used solely for the purpose of excluding a dictum on the question now presented.

There was error in overruling the motion of the Southern Surety Company for judgment as of nonsuit.

Reversed.

STATE v. CHEVIS HERRING.

(Filed 27 January, 1931.)

- 1. Criminal Law G 1—Evidence discovered as result of confession is admissible although confession is incompetent.**

The fact that a confession of the defendant is incompetent because not voluntarily given does not render certain incriminating evidence discovered by reason of the confession incompetent, and such evidence is admissible when otherwise competent.

- 2. Criminal Law G f—Testimony in this case held admissible as being of admission by defendant.**

Testimony by a witness of a conversation between the two prisoners charged with murder is competent against the one whose conversation admitted certain facts tending to implicate him in the commission of the crime as being of an admission by him.

APPEAL by prisoner, Chevis Herring, from *Moore, Special Judge*, at August Term, 1930, of SAMPSON.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one F. F. Newton.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

STATE v. HERRING.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Howard H. Hubbard for defendant.

STACY, C. J. The record discloses that on 28 June, 1930, F. F. Newton was brutally assaulted and robbed while on his way from Kerr, N. C., where he was postmaster, to his home in the country, a distance of approximately two and a half miles. He died the next day from the effects of the assault.

The indications were that two persons had ambushed themselves near a bay and along the road traveled by the deceased. A struggle ensued. There were signs of a beaten down place and a trail in the grass with foot prints on either side, where the body of the deceased had evidently been dragged from the road to the bay.

As a result of an alleged confession made by the defendant, Chevis Herring, but which the court excluded as involuntary, the officers found a number of things which tallied with what the defendant had said in his alleged confession. Among these was the watch of the deceased which had been wrapped in an old envelope addressed to the defendant. Likewise a string used as a watch chain, etc. A piece of bloody cloth was also found near the scene of the struggle, which apparently had been torn from Chevis Herring's shirt. This evidence was competent. *S. v. Moore*, 2 N. C., 482; *S. v. Danelly*, 116 S. C., 113, 107 S. E., 149, 14 A. L. R., 1420; 8 R. C. L., 196; 1 R. C. L., 472.

The prisoner's chief exception is to an alleged colloquy had between himself and his brother, Ernest Herring, while the two were in jail, awaiting trial, both being charged with the murder of F. F. Newton. Deputy Sheriff R. H. Holland testified that he secreted himself under the cell window and heard the two arguing about how the deceased was killed: "Chevis said, 'Ernest, you know you made the bargain.' And Ernest said, 'Why did you tell a lie on me?' And Chevis said, 'You did the hitting, and I went to Kerr Station and you told me to come on there, and we went there, and you got behind the stump and hit the man, and I said, "you ain't going to kill the old man, are you?" And you promised me you would not have my name in it.' Ernest said to Chevis, 'What do you want to lie on me for? You know I didn't have anything to do with it.' Chevis said, 'You just as well tell the truth about it, the Lord knows.' Ernest said, 'You know you are just telling a lie on me.' And Chevis said, 'Lord, Lord, Lord,' and whistled, and said, 'You know what the bargain was.'"

This colloquy, as we understand it, or at least that part of it attributable to the present defendant, clearly indicates an admission or declaration on his part of participation in the crime. It is true, he under-

STATE v. HERRING.

took to inculcate his brother with the actual killing of the deceased, but at no time did he purport to exculpate himself from participation in the homicide. Both his presence at the scene and his participation in the crime were conceded by the defendant in his part of the alleged conversation.

The principle, therefore, upon which the prisoner relies, to wit, that a statement which attempts to exculpate the declarant and inculcate another is not admissible as against the latter (16 C. J., 657), would seem to be inapplicable to the evidence here offered.

Ernest Herring denied all knowledge of the crime. He neither admitted his own complicity nor charged his brother with participation therein. The alleged statements of Chevis Herring, on the other hand, clearly indicated full knowledge on his part and partook of the nature of admissions. 16 C. J., 660. This evidence, therefore, was competent, and the court committed no error in admitting it as against Chevis Herring.

The remaining exceptions are without substantial merit. They must be overruled. A careful perusal of the record leaves us with the impression that no reversible error was committed on the trial, hence the verdict and judgment will be upheld.

No error.

STATE v. ERNEST HERRING.

(Filed 27 January, 1931.)

Criminal Law G f—Testimony of alleged admission by prisoner held incompetent as not tending to implicate him in crime.

Where the prisoner is on trial for murder alleged to have been committed by him and another, testimony of a conversation between them in which he consistently denied the accusations of the other as to the commission of the crime, and containing no admission of any fact tending to implicate him therein, is incompetent, the conversation not containing any material admission by the defendant, and being distinguishable from *S. v. Herring, ante*, 306.

APPEAL by prisoner, Ernest Herring, from *Moore, Special Judge*, at August Term, 1930, of SAMPSON.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one F. F. Newton.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

STATE v. HERRING.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Algernon L. Butler and Henry A. Grady, Jr., for defendant.

STACY, C. J. This is a companion case to *S. v. Chevis Herring*, ante, 306, as both relate to the same murder, though the two defendants were tried separately, before different juries, and on different bills of indictment.

To avoid repetition, we may say that the evidence appearing on the present record is sufficient to carry the case to the jury.

Ernest Herring contends, as did Chevis Herring on his appeal, that the testimony of Deputy Sheriff R. H. Holland, relative to an alleged colloquy had between the prisoner and his brother, while the two were in jail awaiting trial, which the witness overheard, is incompetent as to him. We quote the testimony again, as it is slightly different on the present record from what it was on Chevis' appeal: "Ernest said to Chevis, 'What do you want to lie on me like this for?' and Chevis said he was not telling a lie. Ernest said to Chevis, 'You know you killed him yourself.' And Chevis said, 'You know I didn't; you made the bargain yourself. I didn't have anything to do with it until you made the bargain on Thursday afternoon, and I told you at that time that the old man didn't have any money, and I had done and forgotten about it until you met me at the branch.' And Ernest said, 'You are lying—you are telling a lie on me. Why don't you come on and tell the truth? The Lord knows.' And Ernest broke in on him again and told him he was telling a lie, and Chevis said, 'Lord, Lord, Lord,' and whistled. Ernest said Chevis did it and Chevis said he didn't have anything to do with it, and Chevis said, 'You told me you would not have my name in it if the man got you.'"

There is nothing in the foregoing colloquy, as detailed by the witness, which partakes of the nature of an admission on the part of Ernest Herring that he was present, participating in the crime. It is true, he is alleged to have said to Chevis, "You know you killed him yourself," which the State contends was born of a guilty knowledge, but, in the light of all that was said, we regard this a *non sequitur*. Throughout the entire colloquy, Ernest Herring continually challenged the correctness of his brother's statements. He at no time declared his own complicity in the crime; and we think it was error to admit this evidence as against the present defendant. The whole conversation amounted to no more than an accusation by Chevis against Ernest, which the latter denied. *S. v. Mitchell*, 49 S. C., 410, 27 S. E., 424; *People v. Harrison*, 261 Ill., 517, 104 N. E., 259; 16 C. J., 659-660.

YOUNG v. HARDWOOD CO.

There are other exceptions on the present record worthy of consideration, but as they may not arise on another hearing, we shall not consider them now. The prisoner is entitled to a new trial, as indicated, for error in the admission of evidence.

New trial.

ARTHUR YOUNG v. ANDREWS HARDWOOD COMPANY.

(Filed 27 January, 1931.)

- 1. False Imprisonment A c—Affidavit in this case held not to charge any legal offense and warrant issued thereon was void.**

An affidavit charging the prisoner with having stolen goods in his possession "which plaintiff is fully satisfied was stolen" is not sufficient to make out a charge of receiving stolen goods knowing them to have been stolen, or of any legal offense, and a warrant issued thereon will be construed therewith, and such warrant is void.

- 2. Malicious Prosecution A a—Malicious prosecution is founded upon valid legal process, and may not be maintained where process is void.**

Malicious prosecution is one founded upon valid legal process, maintained maliciously and without probable cause, and where the plaintiff in his civil action for damages has been arrested under an invalid warrant he may not maintain an action for malicious prosecution, his remedy being an action for false imprisonment.

- 3. Malicious Prosecution A c—Plaintiff failed to rebut presumption of probable cause arising from finding of true bill and nonsuit was proper.**

In an action for damages for malicious prosecution the fact that the plaintiff was arrested upon the defendant's affidavit before a justice of the peace, bound over to the Superior Court where a true bill was found, establishes probable cause *prima facie*, subject to rebuttal, and where he introduces no evidence in rebuttal at the trial, a judgment as of nonsuit is properly entered.

CIVIL ACTION, before *MacRae, Special Judge*, at September Term, 1930, of CLAY.

The plaintiff alleged and offered evidence tending to show that he was a resident of Clay County, and that the defendant was a nonresident corporation engaged in the manufacture, cutting and removing of logs. In order to facilitate the operation of its business, the defendant maintained a general store or commissary where it sold groceries, shoes, clothing, and general merchandise to the general public and to its own employees. This commissary was broken into and various articles of merchandise stolen therefrom. Whereupon, the defendant, by its agent,

YOUNG v. HARDWOOD CO.

Wilhide, signed an affidavit before a justice of the peace named Moore, alleging that the defendant therein and two others "did unlawfully, wilfully and feloniously have in their possession certain goods which plaintiff is fully satisfied were stolen goods from said company's commissary," etc. The plaintiff asked for a removal before some other justice. Accordingly the case was removed to T. C. Melton, a justice of the peace, who bound the plaintiff over to the Superior Court. Thereafter the grand jury found a true bill against the defendant, but the case was continued "for lack of witnesses" at the May Term, 1929, and for a like reason at the September Term, 1929. Thereafter the solicitor took a *nol. pros.* with leave.

The plaintiff instituted this action for damages. The complaint is drawn solely and exclusively upon the theory of malicious prosecution. At the conclusion of plaintiff's evidence the trial judge sustained a motion of nonsuit, from which judgment plaintiff appealed.

W. C. Wakefield and Don Witherspoon for plaintiff.

J. B. Gray for defendant.

BROGDEN, J. (1) Was the warrant issued by the justice of the peace for the arrest of plaintiff void?

(2) Does an arrest by virtue of void process, nothing else appearing, support a suit for malicious prosecution?

The warrant and the affidavit must be construed together, and an inspection thereof will disclose that no crime known to the law of this State was charged in the affidavit. The possession of goods, "which plaintiff is fully satisfied were stolen goods from said company's commissary," does not charge a criminal offense. *S. v. Whitaker*, 89 N. C., 472; *Cooper v. R. R.*, 165 N. C., 578, 81 S. E., 761; *S. v. Shew*, 194 N. C., 690, 140 S. E., 621; *S. v. Barbee*, 197 N. C., 248, 148 S. E., 249.

The second question of law involves the distinction between actions for false arrest or imprisonment and malicious prosecution. *Corpus Juris*, Vol. 25, p. 444, draws the distinction as follows: "Put briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which false imprisonment will lie, is that in the former the detention is malicious but under the due forms of law, whereas in the latter the detention is without color of legal authority." This Court adopted the same view of the law in *Rhodes v. Collins*, 198 N. C., 23, 150 S. E., 492. *Clarkson, J.*, said: "False imprisonment is based upon the deprivation of one's liberty without legal process, while malicious prosecution is for a prosecution founded upon legal process, but maintained maliciously and without probable cause."

McLEAN v. HARDWOOD CO.

The fact that the plaintiff was bound over to the Superior Court by a magistrate and that the grand jury thereafter returned a true bill establishes probable cause *prima facie*, although such is not conclusive. *Bowen v. Pollard*, 173 N. C., 129, 91 S. E., 711. Moreover, there is no evidence overthrowing or tending to overthrow the legal effect of the finding of the grand jury. Hence the ruling of the trial judge was correct.

Affirmed.

B. A. McLEAN v. ANDREWS HARDWOOD COMPANY AND C. C. COLE.

(Filed 27 January, 1931.)

1. Master and Servant E a—Federal Employers' Liability Act applies to logging roads.

The Federal Employers' Liability Act applies to steam logging roads in this State.

2. Master and Servant E b—Where employee is alter ego and his own negligence is sole cause of injury he may not recover under the act.

The rule that in an action by an employee of a logging road the Federal Employers' Liability Act applies and that contributory negligence will be considered by the jury only in mitigation of damages will not warrant a recovery where the employee was the *alter ego* of his principal and was under duty to see proper conditions surrounded the doing of the work, and his negligence in the discharge of this duty was the sole proximate cause of the injury to himself.

APPEAL by defendants from *Harwood*, *Special Judge*, and a jury, at June Term, 1930, of CHEROKEE. Reversed.

This is an action for actionable negligence, instituted by plaintiff against defendants. The evidence was to the effect that plaintiff acted as brakeman and conductor. He testified, in part: "I have been working up there on that log train something like eight or nine years. . . . I ran this logging train from Andrews to Clay County, where I was working at this particular time; I was not braking (all the time). I had been conductor. The brakeman had to go over the car the same as the conductor and had charge of the brake stick. I couldn't say there is any difference between the brakeman and the conductor. Yes, if I was brakeman on that train I was conductor too. The conductor has charge of the train and the braking of it too—he had to do it. . . . I reckon, in loading the logs on the train the conductor had a right to inspect them and tell the loader how to place them on the cars, and

McLEAN v. HARDWOOD CO.

had a right to inspect them and tell him if they were loaded right or wrong. There was not anything said about the right to do that till we tore down one load one day, and they then told me to do that; we tore down a load and reloaded it. I did not put the chains on the car that day up there. I don't think that when the engine had come back to that place where they were loading the logs that day I inspected them and after I inspected them and put the chains on that load of logs; I never put the chains up across that car because it was getting late. . . . I suppose it was my duty as inspector to inspect that car to see whether the chains were on the cars properly when there was not another man on. When the trainmaster was with me—he was over on the engine—I don't mean to tell the jury that when the trainmaster was there, I didn't have to see that the cars were properly loaded. My duty still remained to see to the loading of the cars and see that it was properly loaded and chained. . . . Q. Whose business was it, or whose duty was it to tell the men which logs to attach to the engine when they would go back to get the logs? Whose duty was it to tell the engineer which car of logs to put in his train when he went back to get a load? A. Part of the time the brakeman and part of the time the conductor. Q. Was it your duty? A. Yes. Q. Whose duty was it to look at the cars and see if they were properly loaded and to tell the engineer to attach his engine to them and take them off? A. I suppose me or Mr. Cole's, one."

The plaintiff was injured by a log rolling off and hurting his hand, and testified how it happened: "The car was going around the curve and my hand was here on the log, and I was looking back. I was not thinking about it—if the logs rolled down they would hit my hand in a position like that; I knew it was a dangerous thing to do. I knew that logs frequently rolled off and notwithstanding that, I put my hand in that dangerous position where the log hit my hand."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff, B. A. McLean, injured by the negligence of the defendant, Andrews Hardwood Company, and C. C. Cole, as alleged in the complaint? Answer: Yes.

2. Did said plaintiff by his own negligence contribute to his own injury as alleged in the answer? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover? Answer: \$500."

Moody & Moody for plaintiff.

M. W. Bell for defendants.

VANDERWAL v. DAIRY CO.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The motions of defendants were denied, and in this we think there was error.

The evidence was to the effect that defendant, in connection with its mills operated a logging road. In this jurisdiction narrow-gauge logging road held "railroad," within statute, as to employee's contributory negligence. *Stewart v. Blackwood Lumber Co.*, 193 N. C., 138. Contributory negligence is no bar to recovery, but mitigates, or diminishes, damages. See C. S., 3465, 3466, 3467, 3468, 3470.

The evidence indicates that plaintiff brakeman and conductor was an *alter ego* and the duty was placed on him to see to the proper loading and inspection, and the injury he complains of was caused by his non-performance of duty for which he is barred from recovery.

In *Christopher v. Mining Co.*, 196 N. C., at page 534, in speaking of the principle laid down in *Mace v. Mineral Co.*, 169 N. C., 143 (Mace was not allowed to recover), this Court said: "In that case the foreman, an experienced miner, was killed in a mine by falling rock and dirt. The workmen in the mine were under his authority. The manner and method of doing the work was left to the foreman's judgment—he being in charge and had to use due care to make the place to work safe, as he went, for those under him. As it were, under the circumstances, he made his own place to work. *Heaton v. Murphy Coal & Iron Co.*, 191 N. C., 835."

In 3 Labatt, Master and Servant (2 ed.), sec. 1260, at p. 3498, we find: "A superior servant cannot recover for injuries caused by his negligence in respect to the issue of orders, or in the matter of supervising the use, disposition, or movements of that part of the plant which is under his control."

For the reasons given, the judgment of the court below is
Reversed.

S. VANDERWAL v. VANCŌ DAIRY COMPANY.

(Filed 27 January, 1931.)

1. Corporations H c—Receiver of insolvent corporation takes property subject to registered mortgage executed by corporation when insolvent.

A receiver of an insolvent corporation acquires and holds its property subject to the liens of mortgages executed by the corporation when insolvent that have been duly registered prior to the time of his appointment, and such mortgages are enforceable against him.

VANDERWAL v. DAIRY CO.

2. Fraudulent Conveyances A c—C. S., 1609, does not apply where property transferred does not constitute bulk of insolvent's property.

A chattel mortgage of an insolvent corporation, executed and registered before the appointment of a receiver for it, will not be construed under the provisions of C. S., 1609, as in effect an assignment for the benefit of creditors in the absence of the fact that the property covered by the mortgage constitutes practically all of the property of the insolvent.

3. Corporations H a—Duties of receiver of insolvent corporation are not substantially the same as those of assignee for benefit of creditors.

The duties of one appointed as receiver in a creditors' bill for an insolvent corporation are not substantially like those of an assignee under a general assignment for the benefit of creditors.

4. Estoppel C b—Seller accepting benefits may not maintain that sale was void for purchaser's failure to comply with terms of original contract.

Where the seller has accepted a chattel mortgage or conditional sales agreement he may not maintain that the sale was void for the failure of the purchaser to comply with the original terms of the contract providing for a cash payment on delivery.

CIVIL ACTION, before *Cranmer, J.*, at March Term, 1930, of NEW HAMOVER.

The plaintiff, who is a stockholder and president of defendant company, instituted an action on 7 July, 1927, to appoint a receiver for said company for the reason that the company was insolvent. Thereafter, on 25 July, 1927, a permanent receiver was appointed. On 22 March, 1927, the Creamery Package Manufacturing Company sold to the defendant certain machinery. The machinery was apparently sold on open account, but the original order stated the terms of said sale to be "\$341.00 on arrival, balance evidenced by four 60-day notes, each note bearing 6% interest."

On or about 1 January, 1929, the Creamery Package Manufacturing Company filed an interplea in the above action alleging that the Vanco Dairy Company was insolvent at the time of the sale of said machinery, and furthermore, that at the time of the sale the defendant corporation agreed to execute and deliver as security for the purchase price of said machinery a conditional sales contract or chattel mortgage, and that said defendant had failed to comply with said agreement.

The evidence further disclosed that on 5 July, 1927, the defendant executed to the intervener, Creamery Package Manufacturing Company, a conditional sales agreement, in which the title and ownership of the machinery was vested in said Creamery Package Manufacturing Company. This conditional sales agreement or chattel mortgage was duly registered on 5 July, 1927, and consequently two days before the suit of plaintiff was instituted. Various creditors of defendant filed answers to the petition of the intervener alleging that the defendant was in-

VANDERWAL v. DAIRY CO.

solvent on 5 July, 1927, when said chattel mortgage was executed and recorded, and that the Creamery Package Manufacturing Company knew of such insolvency, and hence the execution of such conditional sales agreement or chattel mortgage was procured for the purpose of defrauding the creditors of said Vanco Dairy Company.

The cause came on for trial and the following issues were submitted to the jury:

1. Was the Vanco Dairy Company insolvent at the time of the execution of the conditional sales agreement as set out in the answers?

2. Did the Creamery Package Manufacturing Company have knowledge of the insolvency of the Vanco Dairy Company, or reasonable grounds to believe it was insolvent at the time of the execution of said conditional sales agreement?

3. Is the mortgage or conditional sales contract from the Vanco Dairy Company to the Creamery Package Manufacturing Company valid?

The jury answered the first issue "Yes"; the second issue "Yes"; and the third issue "No."

From the judgment upon the verdict the intervener appealed.

Isaac C. Wright for Creamery Package Manufacturing Company, intervener.

Pace & Holmes and S. E. Loftin for creditors.

BROGDEN, J. Is a conditional sales agreement or chattel mortgage executed to secure a preëxisting debt, at a time when the maker of such instrument is insolvent, valid and enforceable against a receiver for the maker, appointed subsequent to the proper registration of the instrument?

It has been uniformly held that a receiver for an insolvent takes and holds the property of such insolvent subject to valid and enforceable liens existing at the time of the appointment provided such liens have been properly executed and recorded. *Withrell v. Murphy*, 154 N. C., 82, 69 S. E., 748; *Acceptance Corporation v. Mayberry*, 195 N. C., 508, 142 S. E., 767. In order to obviate the application of this principle of law, the plaintiffs assert that the transaction set out in the record constitutes an assignment for the benefit of creditors, and is, therefore, governed by C. S., 1609, *et seq.* This position is not tenable for the reason that the court has noted the legal distinction between receivership and assignment for benefit of creditors. The line of demarcation between said remedies was recognized in *Mfg. Co. v. Turnage*, 183 N. C., 137, 110 S. E., 779, where it is written: "Nor is the contention sound, or permissible, that the office and duties of an assignee, under a general assignment for the benefit of creditors, and those of a receiver are even substantially alike."

GRAVES v. DOCKERY.

It is true that there are many decisions of this Court holding in effect that if an insolvent grantor executes a chattel mortgage on practically all of his property to secure a preëxisting debt that ordinarily such transaction will be treated as an assignment, but this record contains no facts indicating that the property covered by the chattel mortgage in controversy constituted practically all of the property of the insolvent.

The cause was tried upon the theory of an assignment for the benefit of creditors and such theory is not maintainable under the law as applied to the facts appearing in the record. The law affords ample remedy to the creditors to attack the conditional sale or chattel mortgage, but the same having been duly executed and recorded before the appointment of a receiver, is valid upon its face.

The intervener insists that the property was originally sold upon condition that a cash payment be made and certain notes executed, and that as such conditions were not complied with, no title passed. This position is likewise untenable, for the reason that the creditor thereafter took the chattel mortgage or conditional sales agreement to secure the entire purchase price.

New trial.

ED GRAVES AND JOHN McDONALD v. ROLIN DOCKERY,
N. W. MINTZ AND JOHN A. TATHAM.

(Filed 27 January, 1931.)

Logs and Logging B c—Before amendment of 1929 one hauling lumber to mill under contract held not entitled to lien under C. S., 2436.

Under the provision of C. S., 2436, prior to the amendment of 1929, persons who cut and log timber to a mill under a contract to do so at a fixed price are not entitled to a lien for such services in an action wherein it appears that the logs were seized on the premises of a railroad company, this interpretation of C. S., 2436, being strengthened by the fact that the amendment of 1929 included within the meaning of the statute those who were engaged in logging to the mill.

CIVIL ACTION, before *Johnson, Special Judge*, at June Term, 1930, of CHEROKEE.

On or about 7 August, 1928, Ed Graves and John McDonald and Will Garrett made a contract with the defendants, Rolin Dockery and N. W. Mintz, according to the terms of which the plaintiffs "agreed to cut and log the timber belonging to said Dockery and Mintz on Anderson Branch on Wiggins Mill Creek in Graham County, at and for \$10.00 per thousand feet. It was further agreed that if any one should stop logging, he forfeited to his partners any unpaid balance due

GRAVES v. DOCKERY.

him." Payments for logging were to be made by John A. Tatham upon monthly statements furnished by Dockery and Mintz. Thereafter Garrett withdrew from the logging operations and the plaintiffs succeeded to his interest. The plaintiffs proceeded with the work until about 1 October, 1928. They allege that about said date the defendants, Dockery and Mintz, breached the contract by failing and refusing to pay plaintiffs for work already done, and Tatham also declined to pay plaintiffs any further sums "for and on account of said Dockery and Mintz." Plaintiffs further allege that by reason of said breach they were unable to go on with the work under the contract. The plaintiffs further allege that there were other dealings between the parties and that as a result of all the transactions there was due them the sum of \$578.75 "for logging and labor."

On 3 December, 1928, plaintiffs filed a lien for \$578.75 "on all the lumber cut from the lands on Wiggins Mill Creek—being about 50,000 feet of lumber on the yard at the railroad siding at Sweet Gum." Plaintiffs allege that thereafter the defendant, John A. Tatham, with notice of plaintiffs' right and lien, removed or caused to be removed a large quantity of said lumber covered by plaintiffs' lien, and converted the same to his own use. Answers were filed by Mintz and Dockery and by Tatham. Thereafter, on 16 June, 1930, the Sterling Lumber Company filed an interplea claiming that it had purchased the lumber on which the lien was filed, prior to 16 September, 1928. The cause came on for trial and judgment was entered "that the plaintiffs are not entitled to a lien on the property described in the complaint or in the lien recorded in the lien docket of Graham County," from which judgment the plaintiffs appealed.

M. W. Bell for plaintiffs.

L. B. Prince for Sterling Lumber Company.

BROGDEN, J. The only assignment of error contained in the record is the ruling made by the trial judge "that plaintiffs were not entitled to a lien on the property described in the complaint or in the lien." Therefore, the question of law arising is whether prior to chapter 69, Public Laws 1929, a person cutting and hauling logs to a mill can thereafter acquire a lien upon the lumber by virtue of C. S., 2436.

C. S., 2436, provides a lien upon lumber for "every person doing the work of cutting or sawing logs into lumber," etc. This statute was construed in *Glazener v. Lumber Co.*, 167 N. C., 676, 83 S. E., 696, and the companion case of *Hogsed v. Lumber Co.*, 170 N. C., 529, 87 S. E., 337. In the *Hogsed* case the Court said: "But we do not think that under the description 'doing the work of cutting or sawing logs into

LEE v. CONSTRUCTION CO.

lumber' will fall those described as engaged on the train hauling logs, such as the engineer on the log train, the trimmerman, the dogger on carriage (unless this means on the saw carriage, in which case he would be engaged in cutting), fireman on the log train, conductor and brakeman on the same, and others engaged in bringing logs to the mill to be thereafter sawed into plank by those engaged in that service. The men engaged in working on the log train in any capacity, the night watchman, and all connected with the repairs to the machinery, or running the log train or bringing in the logs, cannot be said to come within the description, 'engaged in the work of cutting or sawing logs into lumber,' as defined by us in *Glazener v. Lumber Co.*, 167 N. C., 676."

While it was held in *Thomas v. Merrill*, 169 N. C., 623, 86 S. E., 593, that the plaintiff in that case had a lien under the statute, it is to be noted that the logs which were the subject of the controversy, were still in the possession of the plaintiff. Indeed, the dissenting opinions in *Glazener v. Lumber Co.*, *supra*, recognized that a strict construction had been put upon the statute by the Court, and *Hoke, J.*, dissenting, said: "To my mind, it is not the correct nor permissible construction of this statute to restrict its operation to laborers who work at or with the saws." It is, therefore, obvious, that the Court intended to confine the benefit of the lien to those who were directly or indirectly engaged in sawing, moving, and stacking the lumber or doing acts connected with the sawing operation.

Recognizing the narrow construction put upon the statute, the General Assembly by Public Laws of 1929, chapter 69, included within the benefit of a lien those who were engaged in logging the mill. This legislative enactment constitutes strong proof of the fact that those who were therefore engaged in logging, did not come within the purview of C. S., 2436. However, this case arose before the act of 1929, and must be governed by the law existing at the time.

We are therefore constrained to hold that the judgment was correct.
No error.

FRANK LEE, BY HIS NEXT FRIEND, T. M. LEE, v. CHEMICAL
CONSTRUCTION COMPANY.

(Filed 27 January, 1931.)

Judgments L c—Plaintiff held not barred by compensation act of another state from bringing action for damages in this State.

The existence of a workmen's compensation act in another state where a citizen of North Carolina has been injured while engaged there, does not exclude him from maintaining in the courts of this State an action

LEE v. CONSTRUCTION CO.

for damages for the personal injury resulting from his employer's actionable negligence, it appearing that the cause was never finally adjudicated in the other state.

CIVIL ACTION, before *Harwood, Special Judge*, at May Term, 1930, of CLAY.

The plaintiff, an emancipated minor, lived in Clay County, and in April, 1929, was employed by the defendant at Isabella in the State of Tennessee. On or about 3 May, 1929, the plaintiff was injured, and he offered evidence tending to show that his injury was caused by the negligence of defendant. The State of Tennessee had enacted a statute known as the Workmen's Compensation Law, and this statute was in full force and effect at the time of the injury. The Tennessee statute provided that every employer and every employee were presumed to have accepted the provisions of the act, and that whenever a payment was made to a person eighteen years of age or over, the written receipt of such person "shall acquit the employer."

The plaintiff could not read or write, and on 22 May, 1929, made his mark to what purports to be a petition and settlement directed to "the court for approval of the following final settlement, and agree and represent to the court as follows," etc. Upon executing the instrument the plaintiff received from the agent of the defendant \$6.42 in full settlement of his injuries. The paper-writing was never referred to any court or compensation board or any other legal authority, and, therefore, was never approved. Thereafter, the plaintiff returned to his home in Clay County and instituted a common-law action for damages in the Superior Court of Clay County on 4 July, 1929.

The following issues were submitted to the jury:

1. "Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?"
2. "Did the plaintiff sign the paper-writing or release, as alleged in the answer?"
3. "If so, was the execution of the paper-writing or release obtained by fraud and misrepresentation?"
4. "If so, was the plaintiff a minor at the time of the execution of said paper-writing or release?"
5. "What damage, if any, is the plaintiff entitled to recover?"

The jury answered the first issue "Yes"; the second issue "Yes"; the third issue "Yes"; the fourth issue "Yes"; and the fifth issue "\$1,000."

From judgment upon the verdict the defendant appealed.

Moody & Moody, J. B. Gray and D. Witherspoon for plaintiff.
A. Hall Johnston for defendant.

MITCHELL v. SHUFORD.

BROGDEN, J. Was the plaintiff precluded by the Compensation Act of Tennessee from instituting and maintaining an action for damages in the courts of North Carolina?

In *Johnson v. R. R.*, 191 N. C., 75, 131 S. E., 390, this Court held that the Compensation Act of Tennessee did not exclude a citizen of this State from maintaining in our courts an action for damages for personal injury resulting from actionable negligence. The Court said: "To hold that a citizen of this State, under such circumstances, had no remedy, except that provided by the Tennessee Compensation Act in force in the State in which he was injured, having been induced to go there to work in an emergency, would be a denial of any remedy in the courts of this State. This Court cannot so hold."

The record discloses that the jurisdiction of the Compensation Board in Tennessee was never invoked by the plaintiff, nor was his claim presented to any sort of court or judicial tribunal. There was a blank order approving the final settlement, but such order was never signed. Hence the paper-writing signed by the plaintiff was no more than a release. Evidence was offered at the trial tending to show that the purported release was secured by means of fraud, and the jury so found. Therefore, we hold that the trial judge ruled correctly when he held that the Compensation Act of Tennessee did not apply.

No error.

JOHN MITCHELL, CHIEF STATE BANK EXAMINER, AND BLUE RIDGE BUILDING AND LOAN ASSOCIATION, A CORPORATION, PLAINTIFF, v. W. E. SHUFORD, DEFENDANT.

(Filed 27 January, 1931).*

Mortgages H h—Receiver of insolvent trustee may not execute power of sale contained in deed of trust.

Where a deed of trust is given to secure an indebtedness of the trustor the title passes to the trustee for the purpose of security, and the insolvency of the trustee does not affect his duty to make a sale under the power of sale contained in the deed, and where the trustee becomes insolvent after the right to foreclose has become fixed according to the terms of the deed, and a chief State Bank Examiner has been appointed, in the absence of statute, the said Bank Examiner may not exercise the power of sale, the remedy being a civil action by the holders of the notes against the trustor and the trustee, or proceedings to foreclose by the trustee under the power, or they all can agree upon a substitute trustee.

APPEAL by defendant from *MacRae*, *Special Judge*, at December Term, 1930, of BUNCOMBE. Reversed.

MITCHELL v. SHUFORD.

*I. M. Bailey and Geo. H. Wright for plaintiffs.
Heazel, Shuford & Hartshorn for defendant.*

CLARKSON, J. The question involved in this appeal is whether or not John Mitchell, Chief State Bank Examiner for the Corporation Commission, as liquidating agent of Central Bank and Trust Company of Asheville, an insolvent bank in the hands of said agent of said commission, can exercise the power of sale contained in a deed of trust to said bank as trustee, and make a deed to the purchaser at the sale under the power when such bank did not suspend operations and such examiner for said corporation did not take possession of said bank until after default, whereby the power of sale in such deed of trust became operative and after such bank had given notice of sale as required by the deed of trust and by law; and can exercise the power of sale contained in a deed of trust to said bank as trustee and make a deed to the purchaser at a sale held under the powers contained in said deed of trust? We think not.

From a careful examination of the statutes, we can find no authority, express or implied, for the Chief State Bank Examiner to perform the trust that the owner of the property placed in the Central Bank and Trust Company of Asheville to secure the indebtedness. It is not necessary to set forth the statutes and discuss them. Plaintiff nowhere cites any direct statutory authority and the inferential authority we do not think sufficiently persuasive to change a contract made between the owner of the property, the Central Bank and Trust Company, trustee, and the *cestui que trust*, the owner of the indebtedness. In the present controversy the property was conveyed to the Central Bank and Trust Company, trustee, on certain trusts and conditions and in said deed of trust is fully set out and contained a power of sale in words as follows: "But if the said parties of the first part shall make default in the payment of the said weekly interest as aforesaid, or shall fail or refuse to keep the building on said premises insured as aforesaid, or shall make default in any of the aforesaid stipulations for the space of thirty days, or shall cease to be a member of said association, then, and in such event the debt secured by this instrument shall become instantly due and payable, and the said party of the second part shall have the right, and it shall be its duty when requested by the party of the third part, to immediately enter upon and take possession of the said premises hereby conveyed, and sell the same at public auction for cash or credit, as in its judgment may best subserve the purpose of this deed, first giving notice of sale once a week for four successive weeks in some newspaper published in said city of Asheville, and shall make and deliver to the purchaser thereof a title thereto."

It is settled by numerous authorities that the power of sale contained in a deed of trust is contractual. *Eubanks v. Becton*, 158 N. C., 231; *Brown v. Jennings*, 188 N. C., 155. All the parties to the contract are entitled to have the same carried out as written.

In *Stevens v. Turlington*, 186 N. C., 196, we find: "In this State, mortgages are practically the same as at common law, with the exception of the mortgagor's equity of redemption and its incidents. We adhere to the doctrine that the legal title passes to the mortgagee, subject to the equitable principle that this passage of the legal title is primarily by way of security for the debt, and that for all other purposes the mortgagor is regarded as the owner of the land." *Bank v. Lumber Co.*, 193 N. C., at p. 760.

Speaking of trusts in general, we find in Perry on Trusts and Trustees, Vol. 1 (7 ed.), p. 32, part sec. 43: "It must be understood, however, that corporations are the creatures of the law, and that as a general rule they cannot exercise powers not given to them by their charters or acts of incorporation. . . . If the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them, if it accepts them. . . . (p. 497, part sec. 279). Generally the insolvency or bankruptcy of a trustee does not disqualify him for the trust, nor does his bankruptcy affect the trust estate in his hands; and his certificate does not discharge him from fiduciary obligations."

In the present case, the Central Bank and Trust Company, is a mere naked trustee, the legal title passes to it primarily by way of security for the debt. We see no good reason why it could not sell under the power given it and carry out its contract. If an individual became insolvent or went into bankruptcy we see no good reason why the power of sale in a deed of trust made to him could not be executed by him, and we think the same principle applies to an insolvent bank where there is no valid statute to the contrary.

In *Sullivan v. Kuolt*, 145 N. W., pp. 210-11 (Wis.), we find: "The question raised by the demurrer of the defendant Kuolt is whether he succeeds to the execution of the several trusts set out in the respective complaints by virtue of his having taken charge of the property and business of the Citizens' Savings and Trust Company pursuant to the laws of the State. If he does, it must be by reason of some statutory provision, either express or implied, for, in the absence of such statutory provision, a receiver does not take title to property held in trust. *LeRoy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.), 657; High on Rec. (4 ed.), sec.

BOYD v. R. R.

444; 5 Thompson on Cor., sec. 6602. Neither does a trustee in bankruptcy. 1 Perry on Trusts (6 ed.), sec. 58, 345. Nor an assignee under a voluntary assignment for the benefit of creditors. 5 Cyc., 566. 1 Perry on Trusts (6 ed.), sec. 336. So, whether we regard the Commissioner of Banking as a receiver, trustee, or assignee, he does not succeed to the execution of the trust in question unless he does so by force of statute."

The *cestui que trusts*, those who hold the notes, can foreclose in a civil action in which the mortgagors and the bank trustee are parties, or the bank, trustee, can sell under the power of sale in the deed of trust, or all can agree upon a substituted trustee. *Raleigh Real Est. & Trust Co. v. Padgett*, 194 N. C., 727. The judgment below is
Reversed.

L. L. BOYD, ADMINISTRATOR OF THE ESTATE OF Z. D. BOYD, DECEASED, v.
SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 27 January, 1931.)

1. Master and Servant E b—Railroad company is not liable to employee where independent negligence of third person is sole proximate cause of injury.

Where the plaintiff's intestate, employed by the defendant as flagman at a crossing, is killed while flagging the defendant's crossing with a lantern furnished by the defendant, and there is evidence that the lantern was sufficient to warn those crossing in automobiles and others, and that the intestate was struck by a fast moving automobile, the driver and owner unknown, which struck the intestate and threw him beneath the defendant's train to his death: *Held*, the conduct of the driver of the automobile was an independent and sole proximate cause of the intestate's death, and a judgment as of nonsuit was properly entered, the case of two causes proximately causing the injury in suit not being applicable to the facts of this case.

2. Negligence B c—Where independent negligence of third person is sole proximate cause of injury defendant cannot be held liable.

Where the negligence of a third person is the sole proximate cause of the injury in suit, and acts independently of any alleged negligence on the part of the defendant, the defendant cannot be held liable for the resulting injury.

CIVIL ACTION, before *Oglesby, J.*, at June Term, 1930, of MECKLENBURG.

The plaintiff is the administrator of Z. D. Boyd, deceased, and brings this action to recover damages for the wrongful death of his intestate. Z. D. Boyd was a crossing watchman or flagman employed by the de-

BOYD v. R. R.

fendant and assigned to duty at a grade crossing on North Davidson Street in the city of Charlotte. On the night of 19 March, 1927, the said watchman or flagman, upon noting the approach of a freight train owned and operated by the defendant, went upon the street at the crossing with a red lantern and began "flagging the crossing." The deceased flagman "had an oil lantern. It was a regular flagman's lantern with an oil screen around the globe to protect it." A witness for plaintiff testified: "Upon the night of the injury I was approaching the crossing. There is a knoll in the street about 250 feet south of the railroad tracks, and as I passed over the knoll I saw the flagman come out and begin flagging the crossing." Witness further stated: "I knew the watchman and I knew a train was approaching and knew that it was dangerous." Continuing his testimony, the witness stated that as he began to stop his car another car passed him, driving rapidly, and that the driver of the car, without stopping or attempting to stop, moved onto the crossing at a rapid rate of speed and struck the watchman and knocked him under a train, which was then passing over the crossing. The driver of this automobile, after hitting the flagman and knocking him under the train, came to a stop, turned around and fled from the scene, and so far as the evidence discloses, has never been heard of or apprehended.

At the conclusion of plaintiff's evidence there was judgment of nonsuit, and the plaintiff appealed.

Frank McCleneghan and Stancill & Davis for plaintiff.
Cansler & Cansler for defendant.

BROGDEN, J. Is a railroad company liable in damages for the negligent act of a third party who strikes a crossing flagman with an automobile and knocks him under a passing train? *

The only theory upon which the plaintiff seeks to recover is that the lantern furnished by the defendant to the flagman was not a proper instrumentality in that it was an oil lantern and did not throw out sufficient light. This theory, however, is not supported by the evidence. The only eye witness to the killing saw the light and stopped. The red lantern is a sign of danger. Its size and source of illumination are not material if, in fact, the instrumentality actually gave reasonable warning of danger. The function performed by the appliance is more important upon the facts and circumstances of this case than mere mechanical construction. Moreover, it is manifest that the unfortunate death of plaintiff's intestate was proximately caused and produced by the negligence and reckless act of a third party, and that such reckless and negligent act was in no wise related to, growing out of, or dependent

KELLY v. GRANITE CO.

upon any omission of duty upon the part of defendant. Even if there was evidence of negligence upon the part of defendant, the applicable principle of liability is stated in *Craver v. Cotton Mills*, 196 N. C., 330, 145 S. E., 570, in these words: "While there may be more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence. This principle would apply if it should be granted that the defendant was negligent with respect to the light in the tower." Indeed the ruling of the trial judge was in strict accordance with the principles of law announced in *Lineberry v. R. R.*, 187 N. C., 786, 123 S. E., 1; *Thompson v. R. R.*, 195 N. C., 663, 143 S. E., 186.

Affirmed.

H. F. KELLY v. RALEIGH GRANITE COMPANY.

(Filed 27 January, 1931.)

1. Evidence D h—Photographs held properly admitted in evidence for purpose of illustrating witness' testimony.

In an action for damages for an injury alleged to have been caused by defective dinky cars furnished by the defendant, photographs of the cars taken several months after the injury, but testified to be substantially in the same condition as those causing the injury, are properly admitted in evidence for the purpose of the witnesses illustrating their testimony.

2. Master and Servant C b—Testimony that cars had been defective for months held competent on question of employer's knowledge.

Upon evidence tending to show that the plaintiff's injury was caused by the bulging over of defendant's dinky cars, testimony that the defendant's superintendent knew of such condition for several months prior to the injury is competent on the question of the employer's notice of the defect.

3. Master and Servant C f—Question of assumption of risk is ordinarily for the determination of the jury.

An employee has the right to assume that another employee will not suddenly increase the risks of a dangerous employment, and he will not be held to assume such extra risk, and the question of the assumption of risks is ordinarily for the determination of the jury.

CIVIL ACTION, before *Daniels, J.*, at May Term, 1930, of WAKE.

The plaintiff alleged and offered evidence tending to show that on or about 21 June, 1928, he was seriously and permanently injured by the negligence of the defendant. The testimony was to the effect that the plaintiff was working for the defendant at a rock quarry at Graystone,

KELLY v. GRANITE CO.

North Carolina. Rocks were moved to the crusher by means of a dinky engine and cars. Some of these by reason of long use and heavy loading had bulged over the drawheads. The plaintiff was a foreman and was required to keep the cars moving and also to couple cars. The coupling was made by link and pin. In order to make the coupling the plaintiff gave a signal to the engineer to move forward. Thereupon the plaintiff went between the cars to make the coupling when the engineer suddenly and without signal or warning backed another car upon the plaintiff. By reason of the fact that the rear doors of the car bulged over the drawheads only a small space was left between the cars when they came together, and thus the plaintiff was mashed and crushed.

The plaintiff offered evidence tending to show that it was the duty of the engineer to move the cars upon signal.

Issues of negligence, contributory negligence, assumption of risk and damages were submitted to the jury and answered in favor of the plaintiff.

The jury assessed damages in the sum of \$7,000.

From judgment upon the verdict the defendant appealed.

Parker & Allsbrook, Finch & Rand and Murray Allen for plaintiff.

Perry & Kittrell, W. B. Jones and Parham & Lassiter for defendant.

BROGDEN, J. Certain photographs were offered and admitted by the trial judge for the purpose of illustrating the testimony of witnesses. The plaintiff did not know which car injured him, but testified "they were all equally as bad." The photographs were taken about three and a half months after the injury, but the plaintiff testified, "The cars of which I took pictures were in substantially the same condition as at the time I was hurt." Hence the photographs were admissible for the restricted use specified by the trial judge. *Honeycutt v. Brick Co.*, 196 N. C., 556, 146 S. E., 227.

There was also objection to the following evidence: "Of your own knowledge, for how long a time did the superintendent of the Raleigh Granite Company know of those doors bulging over?" (Answer): "As much as six months. Some of them always bulged out. They are all alike, and some are worse than others." This evidence was competent on the question of notice to the employer of the defect complained of. *Blevins v. Cotton Mill*, 150 N. C., 493, 64 S. E., 428.

There are exceptions to the charge of the trial judge, relating to contributory negligence, but a careful examination of the instructions in their entirety discloses no reversible error. There was sufficient evidence of negligence to be submitted to the jury, and, while it is conceded, that the plaintiff was doing a dangerous work, and perhaps was

COTTON MILLS v. MASLIN.

fully aware of the danger, he had a right to rely upon the assumption that the engineer would not suddenly move the cars without warning and without a signal. It was the function of the jury to determine whether the danger was so open, obvious and imminent that no man of ordinary prudence would undertake to couple the cars under the circumstances. *Maulden v. Chair Co.*, 196 N. C., 122, 147 S. E., 740.

No error.

MARSHVILLE COTTON MILLS, INC., v. THOMAS MASLIN ET AL.

(Filed 27 January, 1931.)

1. Reference A a—Court may order a compulsory reference under the provisions of C. S., 573.

The trial court may order a compulsory reference where an accounting is necessary for the information of the court before judgment or for carrying a judgment or order into effect. C. S., 573.

2. Jury C a—Failure to follow proper procedure will operate as waiver of right to jury trial upon exceptions to report of referee.

Where a party to a civil action has preserved his right to a trial by jury by excepting to an order of reference he may waive this right by failing to file exceptions to particular findings of fact by the referee or by failing to tender appropriate issues on the exceptions so made embraced in the pleadings, and by failing to demand a jury trial as to each of these issues.

APPEAL by R. C. Vaughan, receiver Moore County Farms, from *Small, J.*, at December Term, 1929, of BEAUFORT.

Civil action to recover on a \$65,000 note and to determine the priority of certain mortgages. The pleas interposed also rendered an accounting necessary.

Over objections duly entered, a reference was ordered and the matter heard by Hon. Stephen C. Bragaw, who found the facts and reported the same, together with his conclusions of law, to the court.

Appellant filed a number of exceptions to the report of the referee, tendered issues at the end of his exceptions and demanded a jury trial thereon. A jury trial was denied because the issues tendered were not based on the facts pointed out in the exceptions and raised by the pleadings and the demand not sufficiently specific. Counsel for appellant then declined to argue his exceptions before the judge unless opposing counsel would "agree that he could do so without prejudice to his right to a trial upon the issues submitted."

COTTON MILLS v. MASLIN.

From a judgment affirming the report of the referee, the receiver of Moore County Farms, Inc., appeals, assigning errors.

No counsel appearing for plaintiff.

Parrish & Deal for defendant, receiver Moore County Farms.

O. O. Efrid and Ward & Grimes for defendant, W. M. Nissen.

STACY, C. J. The first exception imputes error to the trial court in ordering a reference in this case. The exception is without merit. C. S., 573, provides for a compulsory reference, "2. Where the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect." *Chalk v. Bank*, 87 N. C., 200.

"Our statutes relating to trials by referees serve a useful purpose and must be liberally construed. They aid and simplify the work which would otherwise fall upon the court and jury, and often expedite the litigation and save the parties from trouble and expensive trials, and are a saving in time to witnesses and attorneys"—*Faircloth, C. J.*, in *Jones v. Beaman*, 117 N. C., 259, 23 S. E., 248.

The appellant next complains at the action of the trial court in overruling his motion for a jury trial on the issues tendered by him. The ruling of the court is supported by what was said in *Booker v. Highlands*, 198 N. C., 282, 151 S. E., 635; *Robinson v. Johnson*, 174 N. C., 232, 93 S. E., 743, and *Driller Co. v. Worth*, 117 N. C., 515, 23 S. E., 427.

A party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Wilson v. Featherstone*, 120 N. C., 446, 27 S. E., 124; *Yelverton v. Coley*, 101 N. C., 248, 7 S. E., 672. This was not done in the instant case. Although a party may duly enter his objection to the order of reference, he may yet waive his right to a jury trial by failing to assert such right definitely and specifically in each exception to the referee's report and by his failing to tender the proper issues. *Alley v. Rogers*, 170 N. C., 538, 87 S. E., 326.

Affirmed.

WARDEN *v.* ANDREWS.

PAUL WARDEN *v.* J. K. ANDREWS AND EUGENE TRANSOU, TRADING AS
TRANSOU-JORDAN LUMBER COMPANY.

(Filed 27 January, 1931.)

Pleadings D b — Demurrer for misjoinder of parties and causes held properly sustained in this case.

Where the complaint alleges that several and independent defendants are indebted to the plaintiff in a certain amount arising on separate contracts, a demurrer on the ground of misjoinder of parties and causes of action will be sustained.

CIVIL ACTION, before *Harding, J.*, at May Term, 1930, of YADKIN.

The plaintiff alleged that he purchased certain trucks from the defendant Andrews and gave a note for said purchase price. As a part of the consideration of said purchase the defendant Andrews assigned to him certain contracts for hauling lumber. These contracts are as follows: (a) Contract with J. K. Andrews; (b) contract with Eugene Transou; (c) contract with Transou-Jordan Lumber Co., a partnership composed of Eugene Transou and L. R. Jordan. Plaintiff further alleged that he undertook the performance of said contracts, and during the time of performance there was an agreement between him and Andrews and Transou, acting for himself and the Transou-Jordan Lumber Company, a partnership, that payments were to be made directly to the plaintiff. He further alleged that he had hauled and delivered certain lumber to the defendants under said contracts, and that the amount due by the defendants was \$1,541.57.

The defendant demurred upon the ground that there was a misjoinder of parties and causes of action.

Williams & Reavis for plaintiff.

R. F. Crouse, C. W. Higgins and Folger & Folger for defendants.

BROGDEN, J. An examination of the complaint discloses that the suit is instituted upon separate and independent contracts. Hence the complaint does not tell one connected story, nor do the various causes of action affect all of the parties. Therefore, the trial judge ruled correctly in sustaining the demurrer. *Quarry Co. v. Construction Co.*, 151 N. C., 345, 66 S. E., 217; *Shore v. Holt*, 185 N. C., 312, 117 S. E., 165; *Bank v. Angelo*, 193 N. C., 576, 137 S. E., 705; *Sasser v. Bullard*, 199 N. C., 562; McIntosh N. C. Practice and Procedure, 453.

Affirmed.

BONEY, INSURANCE COMR., v. ODD FELLOWS.

STATE OF NORTH CAROLINA ON RELATION OF DAN C. BONEY, INSURANCE COMMISSIONER, v. DISTRICT GRAND LODGE No. 7, GRAND UNITED ORDER OF ODD FELLOWS IN AMERICA, Inc.

(Filed 27 January, 1931.)

Insurance A d—Defendant held not subject to dissolution under provisions of C. S., 6524.

An incorporated association of lodges doing business in North Carolina providing for payment of death benefits not exceeding five hundred dollars to any one person is not subject to proceedings in dissolution under the provisions of C. S., 6524, and a judgment accordingly entered is according to the express provisions of C. S., 6518, and will be upheld on appeal.

APPEAL by plaintiff from *Harris, J.*, at Chambers, 27 September, 1930. From WAKE. Affirmed.

Attorney-General Brummitt and Assistant Attorney-General Nash for plaintiff.

L. L. Davenport and Clyde Douglass for defendant.

ADAMS, J. This is a proceeding for the dissolution of the defendant under C. S., 6524 on the alleged ground that it is doing business upon inadequate rates, is unable to meet its obligations, delays settlement of its claims, and is practically insolvent. The defendant denies these and other material allegations in the complaint and avers that it is an incorporated association of local lodges of a society which for more than fifty years has been and is now doing a business in this State and providing for the payment of death benefits not exceeding five hundred dollars to any one person. In his reply the plaintiff admits this allegation and in the judgment it is set forth as one of the findings of fact. Upon this admission and finding the trial court adjudged that articles 24 and 25 of chapter 106 of the Consolidated Statutes, under which the action was brought, do not affect or apply to the defendant. The judgment accords with the express provision of C. S., 6518, by which the defendant is exempted from the provisions of these statutes.

Judgment affirmed.

